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Family Law Digest on Matrimonial Property

Katarina Juma
Charles Kanjama



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FAMILY LAW DIGEST:

MATRIMONIAL PROPERTY

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General Editor

Charles Kanjama LLB (UON)
Advocate of High Court of Kenya

Assistant Editor

Katarina Juma LLB (Wales), LLM (Cornell)
Advocate of High Court of Kenya

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LawAfrica Publishing (K) Ltd
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Fax: +254 20 2495067

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FOREWORD

Between 1998 and 2000, ICJ (K) undertook a nationwide research to investigate whether and how women encounter illegitimate barriers in accessing justice from formal courts. One of the research components: looked at issues of Family (inheritance, maintenance etc) and Commercial Law (business employment, enforcement of contracts etc). Research findings confirmed that attitudinal biases across the legal and judicial systems may not be institutionalized, but derogate in a real sense the rights to access justice by women.

After sensitising judicial officers on gender biases that exist in the judiciary, ICJ (K) narrowed the scope to address the issue of Women's Property and Inheritance [1970] Rights in Kenya. In this regard, ICJ continued working with Judiciary by training and sensitising judicial officers on Women's Property and Inheritance Rights with specific reference to Convention on the Elimination of all forms of Discrimination against Women (CEDAW) provisions.

All the activities undertaken were geared towards improving and strengthening Women's Property and Inheritance Rights treatment within the national civil justice system by strengthening institutional policy of the Judiciary through propagating CEDAW and a Judicial Code of Conduct that is specific on guidelines against gender discrimination; by monitoring and evaluating the impact of litigation in Women's Property and Inheritance Rights; by contributing to development of a detailed national gender programme and by coming up with new and sustainable approaches to collaborative strengthening of Women's Property and Inheritance Rights.

This Case Law Digest covers cases that have raised significant or core value issues in Property Rights between spouses spanning three decades up to 2002. The editorial analysis is provided in light of the triple provisions of the Married Women's Property Act, local statutes and applicable common law. The Convention on the Elimination of all forms of Discrimination Against Women is appended.

KAGWIRIA MBOGORI

Executive Director ICJ (K)

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KAGWIRIA MBOGORI

Executive Director ICJ (K)

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INTRODUCTION

There are two general family law regimes in the area of property: *communio bonorum* and *separation bonorum*.¹ The former regime involves community property, and is prevalent in the continental system the latter regime is founded on a system of separate property between spouses and is prevalent in common law countries.² Some countries have developed a regime which applies elements of both separate and community property, on any case, it has been contended that within both regimes there is a move toward enabling devices that allow straightforward management of property during good spousal relations but that allow for equitable sharing of the property in cases of estrangement.³

In community property systems, certain properties acquired during the pendency of the marriage are automatically deemed community property.⁴ Considerations such as who acquired the property and mutual intention to share the beneficial interest are irrelevant considerations in such a system the property is presumed to be owned jointly, generally in equal shares, between the spouses. If the property is movable, it would probably be transferable by one partner without the need for express confirmation by the other, although the other spouse could potentially set aside such a transfer on the ground of fraud, lack of authority, etc. For immovable property, there would generally be a requirement that both spouses consent expressly to any disposition of the property, failing which the same would be *prima facie* void. Different community property regimes would be legislation

1 Students of Roman Law would wince at the use of the term *separation bonorum* to refer to the separate property regime in family law. *Separation bonorum* was a technical term referring to the legal device by which an heir separated the property acquired from inheritance (for purposes of satisfying the testator's creditors) from his independently acquired property. Neither did Roman law have the concept of joint family property (*communio bonorum*), but applied a regime of separation of property between husband and wife, with various modifications (such as dowry) that gave the husband control of the wife's property during the pendency of the marriage. Hence the use of the terms *communio bonorum* and *separation bonorum* in this context may be somewhat anachronistic and imprecise. The terms will be used in a limited context to capture the essence of these two family law regimes on property. (See e.g. Barry Nicholas, *An Introduction to Roman law* Oxford: Clarendon Press, 1962).

2 In England, married women could not own property for most intents and purposes until the passing in 1882 of the Married Women's Property Act. It can be argued that the regime of *separation bonorum* dates back to the commencement of this Act on 1 January 1883. (See section 25 of the Act). In America *separation bonorum* is applied in most of the old colonies. In the former Spanish territories, e.g. California, *communio bonorum* is generally applicable (De Funiak, *infra* note 3)

3 Andrea Fusar, *supra* note 21.

4 "Community property is that property owned in common by husband and wife during marriage. A common development of the law of civil law countries, although having no origin in Roman law but rather from Celtic and Germanic races." William Quincy De Funiak, *Cases and Material on community Property* (Indianapolis 1947) at 4.

establish varying legislative nets, some quite narrow and others rather extensive, of what property would fall into the definition of community property.⁵

In separate property regimes, the fact of marriage by itself has no significance to property relations between spouses or with third parties. Spouses would be treated as any other two related persons in law who order their affairs together, for example partners in a joint business venture. In theory, spouses are capable of keeping their property rights totally separate, though in practice it is increasingly difficult for them to do so. The doctrine of trust especially is equity's attempt to soften the inflexible application of legal property rules to the detriment of a spouse who contributes to the acquisition of property without benefit of a legal property right.⁶ The community property regime was supposedly designed to foster family solidarity and equality between the spouses, although the husband generally had administration rights over the *communio bonorum*. The English pre-1882 system mainly fostered family unity but the husband had an absolute pre-eminence over the wife in property ownership. To redress the balance, separate property was crafted into the legal system.

Separate property was initially Gladstone's somewhat half-hearted attempt to redress the gender imbalance.⁷ It allowed the wife to own property in her own name. In practice, it took much longer for society to change and facilitate inheritance and ownership by women of real property. Hence most property acquired in the marriage remained in the man's name and his absolute entitlement.⁸

5 *Infra* note 35.

6 Some authorities would use equity to redress the injustice of a spouse who contributes to family welfare, even where the same is not specifically referable to any property, but fails to acquire legal title. (See dicta of Lord Denning in *Hine v Hine* [1962] 3 All ER, *Bedson v Bedson* and *Gissing v Gissing* and dicta of Justice Omolo in *Kivuitu v Kivuitu* and *Essa v Essa*). Lord Denning was specifically overruled by the English House of Lords in *Pettit v Pettit*. Justice Omolo's ratio has not been expressly disapproved by the Kenyan Court of Appeal, though in *Kamore v Kamore* one can detect the whiff of change in our jurisprudence.

7 William Gladstone was elected Prime Minister of the United Kingdom in the 1880 General Election. (see Married Women's Property Act, Spartacus Educational <Spartacus @pavilion.co.uk>)

8 Sue Farran, 'What is the matrimonial property regime in Vanuatu?' in Journal of South Pacific Law, Working Paper 4, Volume 5, 2001 (via the Web). (This is an interesting article which provides a comparative analysis of English and French law on property of the spouses. since both regimes were inherited by the Vanuatu legal system).

In England:

"Separation of assets under the Married Women's Property Act 1882, meant that a married woman who brought no personal wealth to be marriage nor acquired any after it, remained virtually 'propertyless'. As it was mostly the husband who either brought property into the marriage or acquired it through his own efforts or inheritance during the marriage, matrimonial property was primarily the man's. In English common law there is, therefore, no matrimonial property regime as such."

In France:

"The Napoleonic Code of 1804 established a matrimonial property regime whereby there was community of movable property brought to the marriage, and community of any property - whatever its nature - acquired after the marriage. The Code also allowed marrying couples to draw up their own contractual regime if they chose not to follow the one in the Code. Although the matrimonial property regime determined

[continued on next page]

The woman would only have possession rights in the matrimonial home, although the presumption of advancement would allow her to own absolutely as a gift any property transferred to her by her husband.

Hence, as is typical in common law jurisprudence, it remained for the system of precedent to gradually work a development in the family law of property, through ingenious recourse to contract law and eventually to trust law. Spouses without legal title would initially be required to prove a quasi-contract that their contribution to the acquisition of property would entitle them to a share in its beneficial interest. Then subsequently, equity brought in its greatest innovation, the law of trust, to provide a remedy to a contributing spouse.

One of the strong points of the system of separate property had been its fostering of certainty in property rights of the spouses, which could be determined at any time within the marriage. This certainty has not however endured the developing jurisprudence of the courts.⁹ It is arguable whether the time is ripe for the discarding of *separatio bonorum* in favour of a *communio bonorum*.

As a jurist however, one recognises that such a step must be the result of a conscious decision by legislators; it should not come about through the tortured, even though ingenious, reasoning of our courts. Certainty needs to be at a premium during such a transformation. Kenyan family law, like the English law of 1960's, is undergoing a metamorphosis catalysed by changing social expectations on the distribution of property. The temptation for our judges is to subtly legislate for the new social context. Such legislation should be avoided, as it lacks certainty, clarity and predictability.

This digest is therefore a review of the decisions of Kenyan courts when faced with this question of the determination of inter-spousal property rights. From *I v I* in 1971 when the High Court determined the applicability of the Married Women's Property Act of 1882 to Kenya right to the recent *Muthembwa v Muthembwa*. Our court through a long tortured path, partly aided and hindered by English jurisprudence that has itself been much at odds,¹⁰ is finally beginning to

[continued from previous page]

determined property rights from the outset and during the course of the marriage, the significance of this was of greatest importance on the termination of the marriage.

9 See Andrea Fusaro note 21 *infra*. The certainty in management of property is now giving ground to a broader discretion than is found in community property regimes.

"One finds a kind of gradual convergence between the two [regimes], as community systems appear to foster the free management of assets, whilst the separation systems tend towards a final sharing, especially in the 'event of divorce. In common law systems, trust has been used as the device for the sharing of property. We could say that the main difference is the broader 'discretionality' of the courts in common law than in civil law."

10 See example JM Eekelaar, *The Matrimonial Home in the Court of Appeal in Law Quarterly Review* (July 1972) at 333. Eekelaar notes with discomfort that the turbulence engendered by unsettled principles of family law in the pre-*Gissing* era had endured in subsequent Court of Appeal decisions such as *Hazell v Hazell* [1972] 1 WLR 301.

grasp the wide ramifications of applying broadly the principles determined in the narrow context of case by case judicial discretion.

This digest critiques the inconsistency of our courts' decisions and proposes a return to the principles in *Pettit* and *Gissing*, even though such a return would probably be short-lived. Like in England, an increasingly conscious Legislature would probably advocate and legislate modifications to the bare property principles in order to adapt them to the Kenyan situation. Whether our Parliament resolves to totally abandon *separatio bonorum*, or to retouch it in a manner that favours equity between the spouses, the decision must be the Legislature's and not the Judiciary's.

The inactivity of the Kenyan Parliament has left us several decades behind our neighbours, in East Africa.¹¹ The Kenyan marriage law is a veritable lacework of strands of varying colours and sizes. It is a testimony to diversity.¹² Yet even diversity and variety should exist in an environment of unity and harmony. This digest is but one step, by no means the first one, in the journey towards a rationalised family law in tune with the demands of equity and justice and the aspirations of the people of Kenya.

11 See for example *Mwakalindile v NBC Holding Corp* *infra* page 171; dealing With the Tanzanian statute on matrimonial homes.

12 Kenyan Parliament's attempt to unify marriage law through the Law of Matrimony Act ended in dismal failure. The marriage of Kenya inhabitants is governed by several statutory provisions, both local and foreign, as well as by African customs, Mohammedan and Hindu Personal Law.

PETTIT V PETTIT [1969]

HOUSE OF LORDS ENGLAND

LORDS REID, MORRIS, HODSON, UPJOHN AND DIPLOCK

Date of Judgment: 23 April 1969

Case Number: 385

Sourced by: ALL ER

Citation [1969] ALL ER 2

Importance

Pettit was the first of the landmark English decisions on family, law to attempt a clarification of the law relating to property interests between spouses. The law had been in a state of turmoil, with the quantity of cases not favouring a clear exposition of the law. The case has often been quoted with approval and its ratio adopted by the local courts. *Pettit* clarifies that the Court does not have power in a section 17 application to vary property rights between spouses. In a sense *Pettit* leaves property law in a state of certainty. Lord Reid and Lord Morris make a distinction between joint property law systems (which provide for community property) and separation of ownership as provided in the English tradition, dating back to the MWPA.²¹ This case also exposes the principles that should be considered in an adjudication under section 17 MWPA. It makes the tentative first steps in extending the ambit of these principles from the domain of purely contractual law (and the necessity to infer a common intention between the spouses) to the wider more discretionary domain of trust (with the increasing pre-eminence of contribution as the determining factor).

[1] Family law Property Matrimonial Home Wife sole legal owner – Improvements to matrimonial home effected by husband – Wife had no intention that husband acquire proprietary interest Doctrine of resulting trust and presumption of advancement Whether husband entitled to beneficial interest in the house in respect of the improvements.

Editor's Summary

The wife purchased the freehold in a property and had it conveyed into her name. The husband undertook internal decoration work. The court considered whether this would entitle him to a beneficial interest in the property.

Held: A husband was not entitled to an interest in his wife's property merely because he had done in his free time jobs which husbands normally do. Since the improvements carried out were generally of an ephemeral character and there was

21 See: also Andrea Fusaro, Systems of Community Property and Separation of Property and Separation of Property Essay on Comparative Law (from the Web).

neither fraud nor a mutual intention or agreement for the husband to gain a beneficial interest, the husband's claim would fail.

Per curiam:

1. The presumption of advancement (that husband's contribution to the wife's property is an absolute gift) is largely diminished in present circumstances,
2. The role of the Court in a section 17 application is merely to determine existing property rights of husband and wife, not to vary those rights merely because the Court thinks, in the light of subsequent events, that the same were unfair. If the spouses had made a clear agreement in regard to ownership, the Judge must give his adjudication accordingly. It would be incredible to hold that Parliament could have intended to put husband's property at the unfettered discretion of a Judge if the wife raised a dispute about it.
3. If a spouse makes improvements of a capital or non-recurring nature, with the acquiescence of the other spouse and in circumstances in which it is reasonable to suppose that they would have agreed to some interest being acquired by the contributing spouse if they had thought about the legal position, he/she acquires a proprietary interest in that property.
4. Section 17 does not allow a court to grant a spouse a beneficial interest in property which he/she did not previously have. Section 17 is purely a procedural section meant to speedily resolve a dispute as to title, not to give a spouse title which he/she did not previously have. There is no suggestion in the Act that section 17 was to result in any common ownership or co-ownership of property.
5. The court's duty in a section 17 application is the same as in any situation where a question of title arises during good marital relations or between a husband/wife and a third party. Such cases would include a declaration of bankruptcy against one spouse, or a situation of threatened execution against one spouse.
6. If both spouses have a substantial beneficial interest but it is not possible to be entirely precise in calculating their respective shares, equality almost necessarily follows.

Assessment

One cannot easily fault the narrow ratio of Profit: that the improvements of the husband in this case were generally of an ephemeral character, and he should not be entitled to obtain a permanent interest in the house on the basis of such contribution in the absence of any agreement between the spouses. In agonising over the general principles to be applied, the Judges tried to resolve the conflicting English decisions on distribution of matrimonial property.

No definitive finding was made on the presumption of advancement. This rebuttable presumption of law, that any transfer of property by the husband to the wife is intended to act as a gift, is either implied or not. If it is implied, it shifts the

burden of proof to the husband were he to allege that any transfer to the wife was not intended as an absolute gift. If alternatively a presumption of trust is implied, the burden of proof remains with the party alleging that any transfer of title between the spouses was meant to be absolute in character. If neither presumption of advancement nor trust is implied, it simply means that the Court would give effect to the legal rights of the parties and any party claiming an equitable interest in property would have the burden of proof. Hence Lord Reid's consideration that the presumption is "much diminished" merely obscures the precise legal position when title passes from one spouse to the other.

The decision in *Pettit* has been lauded for crystallizing inter-spousal property law and exorcising the previously potent vague and widely defined judicial discretion. As Lord Hodson stated, to do otherwise would be to substitute the uncertain and crooked cord of discretion for the golden and straight wand of the law. The court resoundingly disapproved *Appleton v Appleton* [1969] 1 All ER²² where the test was held to be what is reasonable and fair in the circumstances as they have developed. The court was clear: property rights would not be varied simply because harmony had been replaced by discord.

However, their Lordships did not come clear on the question of whether, if a spouse makes a substantial contribution to property in the absence of any common intention of the spouses, the Court ought to determine how they would reasonably have ordered their affairs. Should the Court merely find out how they did, with whom legal title rests, or should the Court impute an intention, where none had been formed, that the contributing spouse should have title to the property? The Lords were also at odds on *whether in* the absence of a clear determination of the beneficial interest of the spouses, equality would be implied. These issues would be subsequently clarified in *Gissing v Gissing* [1970] 2 All ER 780.

It was also unclear whether a proprietary interest would be acquired by a spouse who makes improvements to property after its acquisition. The Matrimonial Property and Proceedings Act of 1970, section 37 (which applies only to married couples and fiancées) was passed as a legislative response to the findings of the Court in this case.

Judgment (Relevant excerpts)

LORD REID: My Lords, the appellant was married in 1952. For about 9 years she and her husband lived in a house which she had inherited. During that time her husband carried out a number of improvements, largely redecorating, on which he says he spent some £800. In 1961 this house was sold and she acquired another. After this had been paid for there was a surplus of a few hundred pounds and he

22 [1965] 1 All ER 44.

used this money, apparently with the consent of the appellant, in paying for his car. The spouses lived for about 4 years in the new house. Then the appellant left her husband, alleging cruelty, and she obtained a divorce in 1967.

The husband then left the house and raised the present proceedings. He said that during those 4 years he carried out a considerable number of improvements to the house and garden and estimated that in doing so he performed work and supplied material to a value of £723. He sought a declaration that he was beneficially interested in the proceeds of sale of the house in the sum of £1 000 and an order on the appellant to pay. Then an order was made that she should pay him £300. The Court of Appeal reluctantly dismissed her appeal, holding that they were bound by the decision in *Appleton v Appleton* [1965] 1 WLR 25. They gave leave to appeal.

For the last 20 years the law regarding what we sometimes called family assets has been in an unsatisfactory state. There have been many cases showing acute differences of opinion in the Court of Appeal. Various questions have arisen, generally after the break-up of a marriage. Sometimes both spouses have contributed in money to the purchase of a house: sometimes the contribution of one spouse has been otherwise than in money: sometimes one spouse owned the house and the other spent money or did work in improving it: and there have been a variety of other circumstances. It might be possible to decide this case on somewhat narrow grounds without examining the wider questions, but I do not think that that would be satisfactory. The fact that the appellant has legal aid has enabled the argument to range widely, and I think that it is at least desirable, if not necessary, to deal with the various issues which have emerged.

Many of the cases have been brought by virtue of the provisions of section 17 of the Married Women's Property Act of 1882. That is a long and complicated section: the relevant part is as follows:

"In any question between husband and wife as to the title to or possession of property, either party ... may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice ... and the Judge ... may make such order with respect to the property in dispute ... as he thinks fit."

The main dispute has been as to the meaning of the latter words authorising the Judge (including a county court Judge and now a registrar) to make such order with respect to the property in dispute as he thinks fit. These are words normally used to confer discretion on the Court: where the discretion is limited, the limitations are generally expressed: but here no limitation is expressed. So it has been said that here these words confer on the Court an unfettered discretion to override existing rights in the property and to dispose of it in whatever manner the Judge may think to be just and equitable in the whole circumstances of the case. On the other hand it has been said that these words do not entitle the Court to disregard any existing property right, but merely confer a power to regulate

possession or the exercise of property rights or more narrowly, merely confer a power to exercise in proceedings under section 17 any discretion with regard to the property in dispute which has already been conferred by some other enactment. And other intermediate views have also been expressed.

I would approach the question in this way. The meaning of the section cannot have altered since it was passed in 1882. At that time the certainty and security of rights of property were still generally regarded as of paramount importance and I find it incredible that any Parliament of that era could have intended to put a husband's property at the hazard of the unfettered discretion of a Judge (including a county court Judge) if the wife raised a dispute about it. Moreover, this discretion, if it exists, can only be exercised in proceedings under section 17: the same dispute could arise in other forms of action; and I find it even more incredible that it could have been intended that such a discretion should be given to a Judge in summary proceedings but denied to the Judge if the proceedings were of the ordinary character. So are the words so unequivocal that we are forced to give them a meaning which cannot have been intended? I do not think so. It is perfectly possible to construe the words as having a much more restricted meaning and in my judgment they should be so construed. I do not think that a Judge has any more right to disregard property rights in section 17 proceedings than he has in any other form of proceedings.

It was argued that the present case could be decided by applying the presumption regarding advancement. It was said that if a husband spends money on improving his wife's property, then, in the absence of evidence to the contrary, this must be regarded as a gift to the wife. I do not know how this presumption first arose, but it would seem that the Judges who first gave effect to it must have thought either that husbands so commonly intended to make gifts in the circumstances; in which the presumption arises that it was proper to assume this where there was no evidence, or that wives' economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the Courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished. I do not think that it would be proper to apply it to the circumstances of the present case.

And there is another matter I must deal with before coming to the crucial questions. There are at least suggestions in some cases that property rights may be different before and after the break-up of a marriage. I can see no ground for this. There are other occasions for disputes as to rights of property besides break-up of the marriage, and it appears to me that the property rights of the spouses must be capable of determination immediately after the property has been paid for or the improvements carried out and must in the absence of subsequent agreements or transactions remain the same. There are also suggestions that agreements or

arrangements made by the spouses may be rendered inoperative by, or may have a different effect after, the breakdown of the marriage. I suppose that an agreement could take an unusual form, but as a general rule I would think that most improbable. The question does not arise in the present case.

I can now come to the main question of how the law does or should deal with cases where the title to property is in one of the spouses and contributions, towards its purchase-price have been made or subsequent improvements have been provided by the other. As regards contributions, the traditional view is that, in the absence of evidence to the contrary effect, a contributor to the purchase-price will acquire a beneficial interest in the property; but as regards improvements made by a person who is not the legal owner, after the property has been acquired, that person will not, in the absence of agreement, acquire any interest in the property or have any claim against the owner.

Let me suppose that a house which requires extensive renovation or improvement is acquired by one spouse putting down the deposit and taking the title. Installments of the purchase price and the cost of the improvements will then have to be paid. The other spouse may be willing and able to help, and as a pure matter of convenience, without any thought of legal consequences and without making any agreement, one spouse may pay the installments of the purchase price and the other may pay for the improvements. On this view the legal position will be different according as the contributing spouse pays the installments or the cost of the improvements. Payment of the installments will obtain for him or her a proprietary interest in the house, but payment of the cost of the improvements will not give him or her either an interest in the house or a claim against the other spouse. That seems to me to be entirely unsatisfactory. It is true that the Court will do its best to spell out an agreement to prevent this, but I shall return to that matter.

Then go a step further. There is no question of making any improvements but the wife who wants to contribute pays all the household bills thus enabling the husband who holds the title to the house to pay the instalments. That wife will have no claim of any kind. And go a step further still. The wife may not be able to make any financial contribution but by good management and co-operation she may make it possible for the husband to pay the instalments regularly. Again on this view she will have no claim. Opinions may differ as to whether in one or both of these cases she should have any claim.

Views have been expressed that the law does give a claim to the contributing spouse in the first, or the first and second, or in all the three cases which I have outlined. But there has been no unanimity as to the legal basis or the legal nature such claims. I think that broadly there are two views. One is that you ask what reasonable people in the shoes of the spouses would have agreed if they had directed their minds to the question of what claim the contributing spouse ought to have. The other is that all property used for family purposes must, in the absence of

agreement, be regarded as the joint property of the spouses or as belonging to them in equal shares, no matter which spouse bought or inherited it or contributed to its acquisition.

We must first have in mind or decide how far it is proper for the Courts to go in adapting or adding to existing law. Whatever views may have prevailed in the last century, I think that it is now widely recognised that it is proper for the Courts in appropriate cases to develop or adapt existing rules of the common law to meet new conditions. I say in appropriate cases because I think we ought to recognise a difference between cases where we are dealing with 'lawyer's law' and cases where we are dealing with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers. On such matters it is not for the Courts to proceed on their view of public policy for that would be to encroach on the province of Parliament.

I would therefore refuse to consider whether property belonging to either spouse ought to be regarded as family property for that would be introducing a new conception into English law and not merely developing existing principles. There are systems of law which recognise joint family property or *communio bonorum*. I am not sure that those principles are very highly regarded in countries where they are in force, but in any case it would be going far beyond the functions of the Court to attempt to give effect to them here.

But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there was in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think that it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement or any request by that other that he should do so, he acquires no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if the one spouse makes the improvement while the other spouse who owns the property is absent and without his or her knowledge or consent. But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position, I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.

Some reference was made to the doctrine of unjust enrichment. I do not think that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another.

And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved.

No doubt there would be practical difficulties in determining what the parties, or reasonable people in their shoes, would have agreed. But then there is almost equal difficulty in determining whether the spouses did in fact make an agreement, and, if they did, what are its terms. The first difficulty arises out of the principle approved in *Balfour v Balfour* [1919] 2 KB 571 that arrangements between spouses are not generally intended to be contracts or to have legal consequences. That is obviously right with regard to non-financial arrangements. And if the spouses arrange that one shall pay certain accounts I do not think that one incurs any legal obligation to pay those accounts. But it does not necessarily follow that, if that, spouse does pay those accounts, no legal consequences will follow from such payment. The real difficulty is in inferring from some vague evidence of an arrangement what in fact the arrangement was. There is often difficulty in determining what were the terms of a commercial contract because the parties did not apply their minds to essential matters. It has often been pointed out that spouses living happily together rarely apply their minds to matters which must be determined if their arrangement is to be given contractual force. So it is extremely difficult at a later date to determine what if any contractual effect can be given to some rather indefinite arrangement which preceded the expenditure of money by one of the spouses, and it is hardly possible to apply the ordinary rule that the essential terms of a contract must be sufficiently clearly established before it can be enforced. I do not think that there is much to be said for a rule of law if one finds that Judges are constantly doing their best to circumvent it by spelling out contractual agreements from very dubious material.

In whatever way the general question as to improvements is decided I think that the claim in the present case must fail for two reasons. These improvements are nearly all of an ephemeral character. Redecoration will only last for a few years and it would be unreasonable that a spouse should obtain a permanent interest in the house in return for making improvements of this character. And secondly, I agree with the view of Lord Denning MR expressed in *Button v Button* [1968] 1 WLR 457, 461. He said with regard to the husband ... he should not be entitled to a share in the house simply by doing the do-it-yourself jobs which husbands often do: and with regard to the wife (at 462):

“The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort

of things which a wife does for the benefit of the family without altering the title to, or interests in, the property.”

I agree with him that *Jansen v Jansen* [1965] 3 All ER 363 was rightly decided. I have more doubt about *Appleton v Appleton* [1965] 1 WLR 25: the facts are not very fully stated and it may have been wrongly decided. But if a spouse provides, with the assent of the spouse who owns the house, improvements of a capital or non recurring nature, I do not think that it is necessary to prove, an agreement before that spouse can acquire any right.

Even if my views are accepted they only go a short way towards solving the many problems which are coming before the Court in increasing numbers. We were informed that last year there were 900 applications in the High Court besides an unknown number in the county courts. The whole question can only be resolved by Parliament and in my opinion there is urgent need for comprehensive legislation.

I would allow this appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, the question of wide general importance which is raised in this case is whether section 17 of the Married Women’s Property Act of 1882, confers a power enabling the Court in its discretion to grant to a spouse a beneficial interest in property which he or she did not previously have. The words of section 17 must be given the meaning which they had when the Act was passed. They cannot now be given an extended meaning even if it were thought that current social conditions pointed to the desirability of endowing some court with wider powers than any now existing.

(... His Lordship considered the history of the Act)

In my view, all the indications are that section 17 (following upon section 9 of the 1870 Act) was purely a procedural section. It gave facility for obtaining speedy decision. It related to ‘... any question between husband and wife as to the title to or possession of property’. In regard to a question as to the title to property the language suggests a situation where an assertion of title by either husband or wife has been met by denial or by counter-assertion on the part of the other. The language is inapt if there was any thought of taking title away from the party whom had it. The procedure was devised as a means of resolving a dispute or a question as to title rather than as a means of giving some title not previously existing. One of the main purposes of the 1882 Act was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this, in my view, negatives any idea that section 17 was designed for the purpose of enabling the Court to pass property rights from one spouse to another. In a question as to the title to property the question for the Court was – ‘Whose is this’ and not – ‘To whom shall this be given’.

It is to be noted that the procedure made possible by section 17 was, permissive and not obligatory. Under it a question could be submitted for the decision of a Judge of the High Court who could sit in private. So also at a time when the ordinary limit of jurisdiction of the county court in personal actions was £50 but as to jurisdiction in equity, (see section 67 of the County Courts Act of 1888) a question (regardless of the amount involved) could be submitted for the decision of a county court Judge who also could sit in his private room: though the proceedings, if not within the normal jurisdiction of the county court (or civil bill court in Ireland), could at the option of the defendant or respondent to them be removed as of right into the High Court.

Questions could, however, and can be referred for the decision of the Courts in the ordinary way. As to the circumstances under which a husband could sue his wife both before and after the Married Women's Property Act 1882, see *Butler v Butler* [1885] 16 QBD 374. Today it is clear that a husband and wife can enter into a contract with each other and can sue each other on such a contract. If, therefore, there were and are alternative ways of resolving a question as to the title to property it could not be that there would be a different legal approach according as to which course was adopted. A decision after an informal private hearing was as much subject to appeal as a decision given after a formal hearing in open court. Each decision had to be made according to law. There was no provision which empowered a Judge on the trial of an action between husband and wife concerning a question as to the title to property to give a decision which, however benevolently motivated, was in disregard of the law. There is no provision empowering a Judge on the summary adjudication of a question to act any differently. I do not find this in the words (in section 17) 'as he thinks fit.' Those are, undoubtedly, words which give a judicial discretion. Ample reason for their presence in the section is found when it is remembered that the section is dealing with questions '... as to the title to or possession of property'. There may be cases where discretion can properly be exercised in regard to possession and in regard to remedies. I cannot, however, interpret the words 'as he thinks fit' as endowing a Judge with, the power to pass the property of one spouse over to the other or to do so on some vague basis that involves estimating or weighing the good or bad behaviour of the one and the other or assessing the deserts of the one or the other in the light of their work, activities and conduct. If matrimonial troubles bring the spouses to the Courts there are various statutory powers relating to property which can be exercised. But if in a 'question' between a husband and a wife as to the title to property recourse is had to the special procedure made possible by section 17, decision must be reached by applying settled law to the facts as they may be established.

It appears to have been generally accepted that if in a question as to the title to some property a Judge is able after hearing evidence to come to a conclusion that there was a clear agreement between husband and wife in regard to ownership he must give his adjudication accordingly. He cannot then make an order which

withdraws title from the party to whom on his finding it belongs. The same result must, I think, follow if, apart from any agreement between the two of them, the evidence clearly establishes that the property is in one rather than the other. The difficult case is where each party claims ownership and where the evidence is meagre. It cannot, in my view, be that the jurisdiction of the Court is then on a different basis. The search must still be to find an answer to the question as to where ownership lies. The court has to reach decision in very difficult circumstances but the task, the duty and the objective of the Court does not change. The court is not suddenly absolved from its duty. The question for decision does not alter merely because evidence is scanty or because the task of reaching decision is perplexing.

In the lengthening line of cases in which questions between spouses have called for adjudication under section 17, the nature of the difficulties which arise is constantly and recurrently made manifest. When two people are about to be married and when they are arranging to have a home in which to live they do not make their arrangements in the contemplation of future discord or separation. As a married couple they do not, when a house is being purchased or when the contents of a house are being acquired, contemplate that a time might come when decision would have to be made as to who owned what. It would be unnatural if at the times of acquisition there was always precise statement or understanding as to where ownership rested. So, if at a later date questions arise as to the ownership of a house or of various things in it, though as to some matters no honest difference of view will arise, as to others there can be such honest difference because previously the parties might never really have applied their minds to the question as to where ownership lay.

For the reasons which I have given I consider that the duty of a court when adjudicating under section 17 is no different in a difficult case from what it is in a straightforward case. By the latter I mean a case in which after ascertaining the facts and considering the evidence the Court can without difficulty decide that one party is the owner of certain property. The court cannot then award it or a share in it to the other party and cannot in section 17 proceedings do so even if the latter was thought to have deserved a different result. In a difficult case the facts will not be readily ascertainable and the evidence will be slender. The court must however, do its best. It cannot then abandon its task which continues to be the task of deciding the question submitted to it.

It follows from what I have said that I agree with some statements of principle which have been expressed in decided cases while disagreeing with others. I agree with what was said by Romer LJ in *Cobb v Cobb* [1955] 1 WLR 731: at 736-737, he said:

"I know of no power that the Court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property, and frequently has to do so on very little material; but where as here,

the original rights to property are established by the evidence, and those rights have not been varied by subsequent agreement, the Court cannot, in my opinion, under section 17 vary those rights merely because it thinks that in the light of subsequent events the original agreement was unfair.”

... His Lordship considered various authorities)

“It may well be that in cases between husband and wife, where one does not expect to find formal contracts or solemn declarations of trust, the question of the beneficial ownership of property used by both in the course of the matrimonial relationship, will, almost invariably, fall to be decided by consideration of casual and informal incidents rather than of studied and deliberate pronouncements. But to say this is to say no more than that the circumstances calling for investigation in such cases are special and require to be considered in the light of that fact. This may mean that in such cases it will frequently be difficult to ascertain the facts but once they are judicially ascertained, either by the acceptance of express evidence, or by inference, or by presumption, the position will be that the rights of the parties must be determined according to ordinary legal principles.”

In the absence of some new legislative provisions giving some discretionary powers to a court to adjust as between husband and wife their legal or equitable interests in property the duty of a court, if disputes arise, must be to reach conclusions as to where those interests belong. The difficulties to be surmounted in doing so are mirrored in the mass of reported cases. In some of these a pattern appears which reflects social conditions which differ from those in earlier decades. After a marriage both husband and wife may for a time be wage earners. They may each make some contributions towards the cost of acquiring a house and of setting up a home. After a time the husband only may be the wage earner. Their arrangements will often have been made without giving much thought to the question as to where legal and beneficial ownership lies. There will have been no thought given to the question whether if they ‘later separate some new allocation of ownership would be fair. What is the Court to do if asked to decide as to the ownership either of a house or of a chattel or, indeed, of some chooses in action? The answer must be that the Court must do its best to obtain all the relevant evidence and, on an assessment of the evidence and on an application of any relevant legal principle, it must reach a decision. The court cannot refuse to decide a case on the ground that the path to conclusion is not floodlit by clear evidence. The duty of the Court in an application under section 17 will not differ from its duty in a situation where a question of title arises not as between husband and wife but by reason of an outside claim. If either husband or wife became bankrupt court would have to decide what property did and what property did not pass to the trustee in bankruptcy. If there is a judgment against either a husband or a wife a decision may have to be made as to what property could and what property could not be the subject of execution. When acting under section 17 the Court must be guided by the same principles as

would apply in any other proceedings where the ownership of property was in question.

The circumstances which have most often created the occasion for an application, under section 17 have been (a) where husband and wife have both made contributions towards the purchase of a house, and (b) where improvements have been made to a house and in either case where a breakdown of the marriage has later occurred. To begin with, I would say that the fact of a breakdown of the marriage is irrelevant in the determination of a question as to where ownership lay before the breakdown: the breakdown will then merely have caused the need for a decision but will not of itself have altered whatever was the pre-existing position as to ownership: it will, however, be relevant in regard to some questions which could be, the subject of a section 17 application.

Where questions of ownership have to be decided the Judge must weigh every piece of evidence as best he may; the fact that the parties are husband and wife with all that is as a result involved is in itself a weighty piece of evidence. Sometimes the conclusion will be that ownership was in one party alone: sometimes the conclusion will be that ownership was in both parties. There will be some cases in which a court is satisfied that both the parties have a beneficial interest and a substantial beneficial interest but in which it is not possible to be entirely precise in calculating their respective shares. In such circumstances, as Lord Evershed MR said in *Rimmer v Rimmer* [1953] 1 QB 63, “equality, I think, almost necessarily ‘follows’.”(...)

Where improvement has been effected to property belonging to one party, the evidence, when examined, might lead to various conclusions. One might be that work was done or expense incurred without any thought that any contractual liability or any ownership disposition would ever result. The spouse who does some work of repair or renovation or decoration in a matrimonial home which, in fact, belongs to the other spouse, would probably do so in circumstances which would create neither a claim nor a right in law. There are so many agreements between spouses which are not contracts, for the reason that the parties never intended that the agreements should be attended by legal consequences (*Balfour v Balfour* [1919] 2 KB 571). In some set of circumstances the conclusion might be reached that some expense incurred by one spouse was to be the subject of reimbursement by the other. Or it could be that work by one was to be paid for by the other. Another conclusion might be that ownership which had hitherto been separate was thereafter to be a common ownership on some newly agreed basis. But each of these conclusions would have to be the result of some agreement. Sometimes an agreement, though not put into express words, would be clearly implied from what the parties did. But there must be evidence which establishes an agreement before it can be held that one spouse has acquired a beneficial interest in property which previously belonged to the other or has a monetary claim against the other.

The mere fact that parties have made arrangements or conducted their affairs without giving thought to questions as to where ownership of property lay does not mean that ownership was in suspense or did not lie anywhere. There will have been ownership somewhere and a court may have to decide where it lay in reaching a decision the Court does not find and, indeed, cannot find that there was some thought in the mind of a person which never was there at all. The Court must find out exactly what was done or what said and must then reach conclusion as to what was the legal result. The Court does not devise or invent a legal result. Nor is the Court influenced by the circumstances that those concerned may never had had occasion to ponder or to decide as to the effect in law of whatever were their deliberate actions. Nor is it material that they might not have been able even after reflection to state what was the legal outcome of whatever they may have done or said. The Court may have to tell them. But when an application is made under section 17 there is no power in the Court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the Court thinks that the parties would have agreed had they discussed the possible breakdown or ending of their relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated. In my view, these powers are not given by section 17.

If there is a breakdown between spouses there will be a situation for which the parties cannot have provided. There may be a need for new adjustments. At a time when discord has supervened it is not to be expected that the parties concerned will themselves be able to make new dispositions on the basis of what in the circumstances as they have developed would be thought by an independent person to be fair and just. The reported cases and more particularly the pattern of the situations which have given rise to them reflect problems of wide social consequence. Their solution must lie with those who decide policy and enact the law.

Having stated my view as to the powers of a court when acting under section 17, I do not propose to endeavour to review the numerous decisions which were examined during the hearing. In cases which arise conclusion should, in my view, depart upon an analysis of particular facts and detailed evidence and upon an application of recognised legal principles. (...)

LORD HODSON: My Lords, during the last year, so your Lordships were informed, 900 applications were made to the High Court, besides an unknown number in the county courts, in connection with disputes between husbands and wives as to the ownership of property. That these disputes are difficult to resolve is plain enough, if only because” of the special relationship between husband and wife. They do not as a rule enter into contracts with one another so long as they are living together on good terms. It would be very odd if they did.

An illustration, perhaps an extreme one, is provided by the case of *Balfour v Balfour* [1919] 2 KB 571. There Sargant J held that the parties, who were husband

and wife, had entered into a contract, fixing the husband's obligation to maintain his wife during a temporary separation at £30 a month. Apart from the husband and wife relationship the Judge's decision could hardly have been questioned, but the Court of Appeal used strong words in support of the proposition that mutual provisions made in the ordinary domestic relationship of husband and wife do not of necessity give cause for action on a contract. Atkin LJ pointed out (at 579) that 'these arrangements are not sued upon because the parties in the inception of the arrangement never intended that they should be sued upon. The *Balfour* decision has no direct bearing on the kind of situation which has arisen here but I think it rightly indicates that the Court will be slow to infer legal obligations from transactions between husband and wife in the ordinary course of their domestic life. (...)

I adhere to the opinions expressed in the *National Provincial Bank* case, in effect reaffirming the language of Romer LJ in *Cobb v Cobb* [1955] 1 WLR 731, 736, 737, when he said:

"I know of no power that the Court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property, and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence, and those rights have not been varied by subsequent agreement, the Court cannot, in my opinion, under section 17 vary those rights merely because it thinks that in the light of subsequent events the original agreement was unfair."

If a wife is left by her husband, she may not establish any claim on his property by calling it a family asset but, as the law stands at present, she will have a right to apply for a maintenance order against him for herself and any children who are in her care. I agree that the case put by Lord Diplock is common and typical today. There is also, of course, the common case where the parties work together in harmony to build up their home. The wife, who had earned a substantial income before marriage, gives up her work and devotes herself to the management of the house, her husband and children to the exclusion of all else. The husband prospers and buys a house, car and various household goods such as machinery of a labour-saving character. They do not, in my opinion, ipso facto become family assets of which the wife is part owner. If this seems hard, it is in part compensated by the liability to maintain his wife which the law imposes on a husband. This common situation was illustrated recently in a picturesque manner by the Learned President of the Probate, Divorce and Admiralty Division, in an extra judicial address. He said: 'The cock can feather the nest because he does not have to spend most of his time sitting on it.' I do not myself see how one can correct the imbalance which may be found to exist in property rights as between husband and wife without legislation. (...)

I agree that this appeal be allowed.

LORD UPJOHN: (...)

“The law of this Court is perfectly settled that when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is intended as a gift or advancement to the wife absolutely at once, subject to such marital control as he may exercise. And if a husband invests money, stock, or otherwise, in the names of himself and his wife, then also it is an advancement for the benefit of the wife absolutely if she survives her husband, but if he survives her, then it reverts to him as joint tenant with his wife.”

So in such a case as a practical matter where the property is in joint names the presumption is in effect no more than a joint beneficial tenancy. (...)

In my opinion, today the doctrine of resulting trusts still represents the common sense of the matter and what the parties would have agreed had they thought about it.

But these recent cases seek to impose upon the Courts the idea that in the case of ‘family assets’ where both parties are earning and their joint earnings purchase property, there is a special principle leading to a different conclusion.

This does not depend upon the existence of a common banking account. In the very recent case in the Court of Appeal of *Gissing v Gissing* [1971] AC 886. [1970] FLR Rep 269 heard on 18 February 1969, of which your Lordships have been supplied with a transcript, Lord Denning MR stated it thus in his judgment:²³

“This depends on whether it is a family asset. This principle has been frequently stated. I tried to do it myself in *Fribance v Fribance* (number 2) [1957] 1 WLR 384 at page 387. But it has been much better done by Diplock LJ in *Ulrich v Ulrich and Fekilton* [1968] 1 WLR 180, 189. It comes to this: where a couple, by their joint efforts, get a house and furniture... intending it to be a continuing provision for them for their joint lives, it is the *prima facie* inference from their conduct that the house and furniture is a ‘family asset’ in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what or who goes out to work and who stays at home. If they both contribute to it by their joint efforts, the *Prima facie* inference is that it belongs to them both equally: at any rate, when each makes a financial contribution which is substantial.”

My Lords, we have in this country no doctrine of community of goods between spouses and yet by judicial decision were this doctrine of family assets to be accepted some such a doctrine would become part of the law of the land. I do not myself believe it accords with what the parties intended even if *sub silentio* or would regard as common sense. Let us, suppose the wife buys a motor car for the family use out of her earnings; according to the doctrine it belongs to the spouses jointly.

²³ Lord Denning’s judgment was subsequently overruled in the House of Lords by a unanimous decision. The dissent of Edmund-Davies LJ was approved, namely that the acquisition was accomplished by the joint efforts of the spouses and that the contribution by the claimant to the joint efforts substantial.

Then the husband goes bankrupt and she finds the trustee in bankruptcy claiming an interest in the car. Or the husband, out of a substantial bonus received from his employers, buys in his name as a family asset a little holiday home for the family in the country. On the unexpected death of his wife he pays estate duty on a moiety, and of course that moiety may pass away possibly to her side of the family under some residuary gift in her will, of course the parties did not intend that, each purchased the property as his (or her) own but for the common use of the family during the subsistence of the marriage. My Lords, in my opinion the expression 'family assets' is devoid of legal meaning and its use can define no legal rights or obligations. Of course, if it appears from the evidence that the parties in fact did agree to pool their assets into one jointly owned fund, that is a different matter, but that must be a question of fact in each case. In the absence of such agreement I would prefer to rely upon the well established principles which will give rise to no such absurd results and which principles, I repeat, represent the common-sense of the matter and what the average couple intend had they expressed their intentions. If there is to be a change that must be done by Parliament.

Furthermore, on the making of a decree of divorce the Court has ample statutory power to do what is fair in the way of varying the marriage settlement and settling the guilty wife's property, for example see section 17 of the Matrimonial Causes Act of 1965, which makes this alleged doctrine of family assets quite out of place.

My Lords, the facts of this case depend not upon the acquisition of property but upon the expenditure of money and labour by the husband in the way of improvement upon the property of the wife which admittedly is her own beneficial property. Upon this it is quite clearly established that by the law of England the expenditure of money by A upon the property of B stands in quite a different category from the acquisition of property by A and B.

It has been well settled in your Lordships' House (*Ramsden v Dyson* [1865] LR 1 HL 129) that if A expends money on the property of B, *prima facie* he has no claim on such property. And this, as Sir William Grant MR, held as long ago as 1810 in *Campion v Cotton* [1810] 1 17 Ves 263, is equally applicable as between husband and wife. If by reason of estoppel or because the expenditure was incurred by the encouragement of the owner that such expenditure would be rewarded, the person expending the money may have some claim for monetary reimbursement in a purely monetary sense from the owner or even, if explicitly promised to him by the owner, an interest in the land (see *Plimmer v Wellington Corp* [1884] 9 App Cas 699). But the respondent's claim here is to a share of the property and his money claim in his plaint is only a qualification of that. Plainly, in the absence of agreement with his wife (and none is suggested) he could have no monetary claim against her and no estoppel or mistake is suggested so, in my opinion, he can have no charge upon or interest in the wife's property.

It may be that as counsel for the Queen's Proctor quite rightly pointed out this case could be decided somewhat on the *Baybur v Balfour* [1919] 2 KB 571 principle, that the nature of the work done was of the type done by husband and wife upon the, matrimonial home without giving the worker a legal interest in it. See *Button v Button* [1968] 1 WLR 4-57. But I prefer to decide this appeal upon the wider ground that in the absence of agreement, and there being no question of any estoppel, one spouse who does work or expends money upon the property of the other has no claim whatever upon the property of the other. *Jansen v Jansen* [1965] page 478 was a very good example of that type of case. The husband, putting it briefly, spent his short married life making very substantial improvements upon the properties of the wife which greatly increased their value as reflected in their sale price. The wife recognised that as between husband and wife he should receive some benefit and instructed her solicitor to draw up an agreement whereby he was to receive monetary recompense from the proceeds of sale of one of the properties he had improved when such sale was effected. The husband refused to accept this so the parties in fact and in law never did agree. In those circumstances it seems to me clear that the husband had no claim against the wife even personally and certainly no claim against the property itself either by way of charge or by way of a share in the property. In my opinion *Jansen v Jansen* was wrongly decided.

My Lords, for these reasons I would allow this appeal.

Appeal allowed.

GISSING V GISSING [1970]

HOUSE OF LORDS ENGLAND

LORDS REID, MORRIS, VISCOUNT DILHORNE, PEARSON AND DIPLOCK

Date of Judgment: 7 July 1970

Case Number: 780

SOURCED BY: ALL ER

CITATION [1970] ALL ER 780

Importance

The decision in *Pettit* left some critical unanswered questions: (1) what happens where no common intention of the parties can be inferred; (2) is there a difference between direct and indirect contributions to the purchase price of the property; (3) will conduct subsequent to the acquisition of property be relevant in determining the common intention, etc. *Gissing* is important because it introduces the concept of trust into determination of property interests. As Lord Reid comments, “there is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference.” In the first case, the Court would give effect to the intentions of the parties, to the extent in which the same are backed by evidence of contribution (i.e. ‘consideration’ in contract law). In the latter, the Court would, in a proper case, impute a resulting trust in favour of the contributing spouse.

[1] Family Law – Property – Matrimonial home – Property legally vested in husband – Wife paid for furniture and contributed to household expenses – Whether there was a common intention that the wife should acquire a beneficial interest in the property – Whether trust may be implied in the absence of a common intention.

Editor’s Summary

During the course of the marriage, the husband purchased the matrimonial home and had it conveyed into his sole name. There was no express agreement as to how the beneficial interest in the house should be shared. The wife provided some money for furniture and improvements, but it was not suggested that her efforts or earnings made it possible for the husband to raise the purchase money for the house. The Court considered whether the wife was entitled to a beneficial interest in the house.

Held: It was not possible to, draw an inference that there was any common intention that the wife should have any beneficial interest in the house.

1. If there is no agreement between the spouses regarding the matrimonial house to which both contributed to the purchase, and the registered owner has evinced no intention that the other spouse should have a beneficial interest in the house, the

question of whether that spouse has a beneficial interest will be dependent on the law of trust.

2. There is no distinction to be drawn in law between the position where a contributing spouse makes direct contributions to the purchase of the property and where he/she makes indirect contributions.
3. The share of the contributing spouse would be proportionate to the contributions, either of direct payment for the property or a fair estimate of indirect contributions. Otherwise there must be a more rough and ready evaluation, which does not necessarily mean that a half share will be a reasonable estimation.
4. There are an infinite variety of circumstances that may arise in the relationship between husband and wife in relation to singly or jointly held properties. The Court does not decide how the parties would have ordered their affairs; it only finds out how they did. It cannot ascribe intentions which the parties never had, nor can ownership of property be affected by the mere circumstance that harmony has been replaced by discord.
5. Unlike the divorce court which has ample power to do what is fair and reasonable having regard to the conduct of the parties, this court is only asked to answer the cold legal question, 'what interest has the wife in the house without regard to the parties' conduct.
6. If the applicant made contributions of a substantial amount towards the purchase of the property, there would *prima facie* be a resulting trust in her favour. This presumption is rebuttable by evidence showing a contrary intention.
7. Any claim to a beneficial interest in land (that is an equitable interest) held by a person, whether a spouse or a stranger, in whom legal estate is vested must be based on the proposition that the legal owner holds it as a trustee on trust. A resulting trust is created by a transaction in which the legal owner so conducts himself by words or conduct that he induces another person to act to his own detriment in the reasonable belief that he was thereby acquiring an interest in the property.

Assessment

Gissing clarified the vague areas of *Pettit*, in particular: (1) by rejecting the maxim of equality in determination of the interest of a contributing spouse; (2) by avoiding the temptation to infer a common intention where none existed; (3) by developing the doctrine of trust and applying it in favour of a spouse who makes substantial contributions even where the other spouse evinces no intention that the beneficial interest in the property should be shared; (4) by removing the distinction between direct and indirect financial contributions; (5) by clarifying that the presumption of advancement would seldom play any decisive role in disputes between spouses in which evidence would be available in addition to the mere fact of contribution by the husband; (6) by clarifying that future conduct of the parties may be evidence of

a prior intention at the time of the acquisition that a contributing spouse should acquire a share in property; and (7) by insisting that a trust would not be imputed unless the legal owner by his conduct has induced the contributing spouse to act to his own detriment in the reasonable belief that he was thereby acquiring a beneficial interest in the property.

English property law between spouses was subsequently reformed by the Matrimonial Causes Act of 1973. However, the principles of *Gissing* continue to be applied where statutory changes are inapplicable, such as between unmarried cohabitants. *Gissing* is still a leading authority in England today.

Lord Bridge in *Lloyds Bank v Rosset* [1991] 1 AC 107 has provided an authoritative interpretation of the principles enunciated in *Gissing* with his two-categories test: the facts were that the matrimonial home, a derelict farmhouse, was purchased in the sole name of the husband, the first defendant. The purchase money had come from the husband's family trust in Switzerland and the trustees had insisted that it be purchased in his name. He paid for renovation work. The wife, the second defendant, made no financial contribution to the purchase, but helped with the renovation. Unknown to the wife, the husband had charged the house to a bank as security for an overdraft. When he defaulted, the bank sought possession of the home. The wife, by way of defence, contended that she was entitled to a half share of the beneficial interest under a constructive trust. It was held:

“The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the Court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify

the inference necessary to the creation of, a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.”

It has been readily agreed that Lord Bridge should have included indirect financial contributions as qualifying contributions for the formation of a trust so as to accord with other English authorities. For example, in *Burns v Burns* [1984] 1 All ER 244,²⁴ which involved a dispute between two unmarried cohabitants, Fox, LJ had stated in the Court of Appeal:

“What is needed, I think, is evidence of a payment or payments by the plaintiff which it can be inferred was referable to the acquisition of the house. ... If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly, referable to the acquisition of the house since, in one way or another, it enables the family to pay the mortgage instalments. Thus, a payment could be said to be referable to the acquisition of the house if, for example, the payer either (a) pays part of the purchase price or (b) contributes regularly to the mortgage instalments or (c) pays off part of the mortgage or (d) makes a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.”

The decision in *Gissing* prompted the English Parliament to pass the 1973 Matrimonial Causes Act to remedy some of the shortfalls of English law *vis-a-vis* a married couple.²⁵

Judgment

LORD REID: My Lords, I agree with your Lordships that this appeal must be allowed. But, as in *Pettit v Pettit* [1970] AC 777, [1969] FLR Rep 555, much wider questions have been raised than are necessary for the decision of the case. I adhere to the views which I expressed in *Pettit's* case and I do not think that I am precluded from maintaining them by the decision in that case. But if I am, then in my view the law is left in a very unsatisfactory position.

I take a common case where husband and wife agreed when acquiring the family home that the wife should make a financial contribution and the title to the house was taken in the husband's name. That contribution could take one or other of two forms: the wife might pay part of the deposit and installments or she might relieve the husband of some of his obligations for example by paying household bills, so as to enable him to pay for the house. The latter is often the more convenient way.

²⁴ See particularly category (d) in *Buns v Burns* *infra*.

²⁵ Sections 24 and 25 are applicable here. The court is urged to give first consideration to the welfare of any child of the family who is a minor. Other considerations include the means, needs, living standards, age disabilities, contributions and foregone benefits of both spouses. (See David Terry, Principles applicable in dividing matrimonial assets, from the Web).

It must often happen that in coming to and carrying out such an agreement or understanding neither spouse gives a thought to the legal position or the legal consequences. The law is *terra incognita* and rather frightening to many people. Spouses generally expect that, on the decease of one of them, his property will go to the other, and I strongly suspect that in a great many cases they do not think about what the position of the wife would be if there were a divorce or the husband became bankrupt, or at least they do not discuss those possibilities. So they do not discuss the question whether carrying out such an understanding will give the wife a share or beneficial interest in the house. If either of them gives a thought to the matter he or she may well think that the law will produce a just result without their assistance. Of course many people are more business-like but many are not.

If there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought.

I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him?

As I understand it, the competing view is that, when the wife makes direct contributions to the purchase by paying something either to the vendor or to the building society which is financing the purchase, she gets a beneficial interest in the house although nothing was ever said or agreed about this at the time: but that, when her contributions are only indirect by way of paying sums which the husband would otherwise have had to pay, she gets nothing unless at the time of the acquisition there was some agreement that she should get a share. I can see no good reason for this distinction and I think that in many cases it would be unworkable. Suppose the spouses have a joint bank account. In accordance with their arrangement she pays in enough money to meet the household bills and so there is enough to pay the purchase price instalments and their bills as well as their personal expenses. They never discuss whose money is to go to pay for the house and whose is to go to pay for other things. How can anyone tell whether she has made a direct or only an indirect contribution to paying for the house? It cannot surely depend on who signs which cheques. Is she to be deprived of a share if she says 'I can pay in enough to pay for the household bills', but given a share if she says 'I can pay in £10 per week regularly'.

It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half share. I think that the high sounding brocard 'Equality is equity' has been misused. There will of course be cases where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half.

But then it is said that there will be few deserving cases where the Court cannot find enough in the evidence to justify a finding that there was at the time of acquisition some kind of agreement or understanding or intention that the wife should have a share. I do not agree. In evidence the husband will say truthfully that the matter was never discussed and that he never considered the question of her having a share. Even if in cross-examination, he were to say that if he had been asked he might have been willing to make some arrangement, that would be quite irrelevant if the law requires a contemporary agreement. And a candid and honest wife would agree that the matter was never discussed, that her husband never indicated any intention to give her a share, and that she never thought about it. On such evidence no Judge could possibly infer that on a balance of probability there was an agreement. On the other hand a more sophisticated wife who had been told what the law was would probably be able to produce some vague evidence which would enable a sympathetic Judge to do justice by finding in her favour. That would not be a very creditable state in which to leave the law.

Returning to the crucial question there is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation. If the law is to be that the Court has power to impute such an intention in proper cases then I am content, although I would prefer to reach the same result in a rather different way. But if it were to be held to be the law that it must at least be possible to infer a contemporary agreement in the sense of holding that it is more probable than not there was in fact some such agreement then I could not contemplate the future results of such a decision with equanimity,

VISCOUNT DILHORNE: My Lords, in this case the respondent claims to be entitled to a share in the beneficial interest in a house bought in 1951 and conveyed to the appellant, her former husband. They married in 1935 and were divorced on the respondent's petition in January 1966. In February of that year the respondent commenced these proceedings by originating summonses. She claimed the entire beneficial interest in the house but, at the commencement of the hearing, she reduced her claim to a one half undivided share in the house.

Its price was £2 695 of which £2 150 was raised on mortgage, and £500 by a loan made to the husband. The balance of £45 and the legal charges were paid by the appellant from his own money.

The appellant and his wife were employed by the same company. The respondent gave up her employment in 1957.

Buckley J held that the loan of £500 was made to the appellant alone and that the repayment of the loan and the mortgage payments were made by him out of his own moneys: then he gave the respondent house keeping money out of which she paid the housekeeping expenses: and that she paid out of her own money for her clothes and for those of their son and for various extras for the family's benefit. The respondent provided some furniture and equipment for the house and paid £30 for having the lawn made. In all she spent about £220 on this. Husband and wife had separate accounts, one at the post office and the other at a bank, and each made savings.

Buckley J held that the conduct of the respondent was:

“... quite insufficient to support the contention that this is a case in which some constructive trust should be erected on the circumstances attending the purchase of the house as a result of which she would have some equitable interest in the property.”

The Court of Appeal by a majority (Lord Denning MR and Phillimore LJ, Edmund Davies LJ dissenting) held that the respondent was entitled to a half share in the house.

Lord Denning based his conclusion on the house being a ‘family asset’. After referring to *Fribance v Fribance* (number 2) [1957] 1 WLR 384 and my noble and Learned friend Lord Diplock’s judgment in *Ulrich v Ulrich and Felton* [1968] 1 WLR 180,189 he said:

“It comes to this: where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is a prima facie inference from their conduct that the house and furniture is a ‘family asset’ in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what: or who goes out to work and who stays at home. If they both contribute to it by their joint efforts, the prima facie inference is that it belongs to them both equally: at any rate, when each makes a financial contribution which is substantial.”

Judgment in this case in the Court of Appeal was delivered before the opinions of your Lordships in *Pettit v Pettit* [1970] AC 777 were given. In the light of the views expressed in *Pettit v Pettit* the passage cited above cannot in my opinion be regarded as good law.

My Lords, in my opinion the decision in *Pettit v Pettit* has established that there is not one law of property applicable where a dispute as to property is between spouses or former spouses and another law of property where the dispute is

between others. In that case my noble and Learned friend Lord Morris of Borth-Y-Gest said:

“The duty of the Court in an application under section 17 will not differ from its duty in situation where the question of the title arises act as between husband and wife but by reason of an outside claim.”

and my noble and Learned friend Lord Upjohn said:

... the rights of the parties must be Judged on the general principles applicable in any Court of law when considering questions of title to property..”

Use of the expression ‘family assets’ was deprecated by my noble and Learned friends Lord Hodson and Lord Upjohn in *Pettit v Pettit* as devoid of legal meaning and conducive to the error of supposing that the legal principles applicable to the determination of the interests of spouses in property are different from those of general application in determining claims by one person to a beneficial interest in property in which the legal estate is vested in another. Despite this criticism it has been used in later cases, *Chapman v Chapman* [1969] 3 All ER 476 and *Nixon v Nixon* [1969] 1 WLR 1676. It is, no doubt, a useful loose expression to refer to the possessions of a family, but family assets are not a special class of property known to the law. The motor car owned by a member of the family, the wife’s money and the husband’s, the television set and many other things are aptly covered by the expression but the application of this expression does not resolve the question to whom does a particular ‘family asset’ belong. Is it to the husband or the wife or to both jointly?

I agree with my noble and Learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest of the claimant as a *cestui que trust*.

Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest.

The difficulty where the dispute is between former spouses arises with regard to proof of the existence of any such common intention. It may be, as in this case, that the claim to a share in the beneficial interest is not made until years after the acquisition of the property. It is most likely that there will be no documentary evidence pointing to the existence of any such intention.

In a great many cases, perhaps in the vast majority, no consideration will have been given by the parties to the marriage to the question of beneficial ownership of the matrimonial home at the time that it is being acquired. If, on the evidence, that

appears to have been the case, then a claim based upon the existence of such an intention at the time must fail.

It may be that one spouse will say that if he or she had thought about it, he or she would have agreed to sharing the beneficial interest with the other, but that in my view will not justify or entitle the Court to hold that they share the beneficial interest. As I read the opinions of the majority in *Pettit v Pettit* that was their conclusion. One cannot counteract the absence of any common intention at the time of acquisition by conclusions as to what the parties would have done if they had thought about the matter. If such a common intention is absent, in my opinion the law does not permit the Court's to ascribe to the parties an intention they never had and to hold that property is subject to a trust on the ground that that would be fair in all the circumstances.

My Lords, in determining whether or not there was such a common intention, regard can of course be had to the conduct of the parties. If the wife provided part of the purchase price of the house, either initially or subsequently by paying or sharing in the mortgage payments, the inference may well arise that it was the common intention that she should have an interest in the house.

To establish this intention there must be some evidence which points to its existence. It would not, for instance, suffice if the wife just made a mortgage payment while her husband was abroad. Payment for a lawn and provision of some furniture and equipment for the house does not of itself point to the conclusion that there was such an intention.

I appreciate that there may be very great difficulty in establishing such an intention where the dispute is between former spouses but that does not alter the question to be decided. In every case it has to be established that the circumstances are such that there is a resulting, implied or constructive trust in favour of the claimant to a beneficial interest or a share in it. In the case of former spouses that will ordinarily depend on whether it can be inferred from the evidence that there was such a common intention.

In the course of this case it has been said that it is with regret that the conclusion has been reached that the respondent's claim fails. I do not share that regret. In my opinion the evidence adduced by her utterly fails to show the existence of any common intention that she should share in the ownership of the house. (...)

LORD PEARSON: The appellant is the owner of the legal estate in the house and *prima facie* the legal estate carries with it the whole beneficial interest. The respondent however claims that she has a partial beneficial interest to the extent of one half or some lesser proportion.

If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was

and is a resulting trust in her favour. If she did make contributions of substantial amount towards the purchase of the house, there would *prima facie* be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption: it can be rebutted by evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the Judge Acting as a jury. (...)

I think also that the decision of cases of this kind has been made more difficult by excessive application of the maxim 'Equality is equity'. No doubt it is reasonable to apply the maxim in a case where there have been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the proportion borne by the contributions to the total price or cost is difficult to fix. But if it is plain that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the Court to feel obliged to award either one-half or nothing.

Contributions are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name or one of the spouses. For instance there can be a contribution if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments.

On the facts of the present case the Judge, Buckley J, decided in effect that the respondent had not made, either directly or indirectly, any substantial contribution to the purchase of the house, and therefore there was no resulting trust in her favour. I agree with him and would therefore allow the appeal.

LORD DIPLOCK: My Lords, the judgments of the Court of Appeal in the instant case were delivered while *Pettit v Pettit* [1970] AC 777 was still pending in your Lordships' House. It concerns a claim by a former wife to a proprietary interest in real property of which the legal estate in fee simple is vested in her former husband subject to a mortgage to a building society which has not yet been fully paid off. Her claim was not brought in the matrimonial proceedings for dissolution of the marriage nor was it instituted under section 17 of the Married Women's Property Act of 1882. It was made by an ordinary originating summons in the Chancery Division for a declaration that she was entitled to a beneficial interest in the house which has been the matrimonial home for some 10 years before her husband deserted her. Her original claim was to the whole beneficial interest, but at the hearing before Buckley J this was reduced to a claim to a one-half undivided share and her case has since proceeded on this basis. She founds her claim upon the contention that she contributed substantially, though indirectly, to the payment by her husband of the original deposit and the subsequent instalments payable under the mortgage which enabled him to acquire the fee simple in the house.

The actual decision of your Lordships' House in *Pettit v Pettit* is thus not directly in point. That case was concerned with a claim made in proceedings brought under section 17 of the Married Women's Property Act of 1882, by a former husband who claimed that he was entitled to a beneficial interest in a house which had been the former matrimonial home. It was not disputed that at the time of the acquisition of the house, which was not purchased on mortgage, the sole beneficial interest in it as well as the legal estate was vested in the wife. The husband's claim to a beneficial interest was based upon the allegation that he had made considerable improvements to the house and garden which had enhanced its value. Your Lordships decided unanimously first, that section 17 of the Married Women's Property Act of 1882, was procedural only and did not entitle the Court to vary the existing proprietary rights of the parties; and, secondly, that upon the facts disclosed by the evidence it was not possible to infer any common intention of the parties that the husband by doing work and expending money on materials for the improvement of the house should acquire any beneficial proprietary interest in real property in which the whole legal and beneficial interest had previously been vested in the wife.

But although, as a matter of decision, *Pettit v Pettit* does not govern the instant appeal, it entailed for the first time a survey by your Lordships of numerous decisions of the Court of Appeal during the past 20 years in which the beneficial interests of spouses in a former matrimonial home had been the subject of consideration not only in applications under section 17 of the Married Women's Property Act of 1882, but also in other kinds of proceedings. In the cases examined the practice had developed of using the expression 'family asset' to describe the kind of property about which disputes arose between spouses as to their respective beneficial interests in it. I myself adopted the expression as a convenient one to denote property, whether real or personal, which had been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for common use or enjoyment of both spouses or their children, such as matrimonial home, its furniture and other durable chattels, but intending any connotation as to how the beneficial proprietary interest in any particular family asset was held. I did, however, differ from the majority of the members of Your Lordships' House who were parties to the decision in *Pettit v Pettit* in that I saw no reason in law why the fact that the spouses had not applied their minds at all to the question of how the beneficial interest in a family asset should be held at the time when it was acquired should prevent the Court from giving effect to a common intention on this matter which it was satisfied that they would have formed as reasonable persons if they had actually thought about it at that time. I must now accept the majority decision that, put in this form at any rate, this is not the law.

In all the previous cases about the beneficial interests of spouses in the matrimonial home the arguments and judgments have been directed to the question whether or not an agreement between the parties as to their respective interests can be established on the available evidence. This approach to the legal

problem involved is in most cases adequate, but it passes over the first stage in the analysis of the problem, *viz*, the, role of the agreement itself in the creation of an equitable estate in real property. In the instant appeal, I think it is desirable to start at the first stage.

Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the Courts, the law relating to the creation and operation of 'resulting, implied or constructive trusts'. Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the Court must, give effect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by section 53(l) of the Law of Property Act of 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application.

A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the Court will give effect to it – notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing. But in the express oral agreements contemplated by these *dicta* it has been assumed *sub silentio* that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase price or to the deposit or the mortgage installments when it is purchased upon mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the

Court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed.

An express agreement between spouses as to their respective beneficial interests in land conveyed into the name of one of them obviates the need for showing that the conduct of the spouse into whose name the land was conveyed was intended to induce the other spouse to act to his or her detriment upon the faith of the promise of a specified beneficial interest in the land and that the other spouse so acted with the intention of acquiring that beneficial interest. The agreement itself discloses the common intention required to create a resulting, implied or constructive trust.

But parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case – a common one where the parties are spouses whose marriage has broken down – it may be possible to infer their common intention from their conduct. (...)

Where a matrimonial home has been purchased outright without the aid of an advance on mortgage it is not difficult to ascertain what part, if any, of the purchase price has been provided by each spouse. If the land is conveyed into the name of a spouse who has not provided the whole of the purchase price, the sum contributed by the other spouse may be explicable as having been intended by both of them either as a gift or as a loan of money to the spouse to whom the land is conveyed or as consideration for a share in the beneficial interest in the land. In a dispute between living spouses the evidence will probably point to one of these explanations as being more probable than the others, but if the rest of the evidence is neutral the *prima facie* inference is that their common intention was that the contributing spouse should acquire a share in the beneficial interest in the land in the same proportion as the sum contributed bore to the total purchase price. This *prima facie* inference is more easily rebutted in favour of a gift where the land is conveyed into the name of the wife: but as I understand the speeches in *Pettit v Pettit* four of the members of your Lordships' House who were parties to that decision took the view that even if the 'presumption of advancement' as between husband and wife still, survived today, it could seldom have any decisive part to play in disputes between living spouses in which some evidence would be available in addition to the mere fact that the husband had provided part of the purchase price of property conveyed into the name of the wife.

Similarly when a matrimonial home is not purchased outright but partly out of moneys advanced on mortgage repayable by instalments, and the land is conveyed into the name of the husband alone, the fact that the wife made a cash contribution to the deposit and legal charges not borrowed on mortgage gives rise, in the

absence of evidence which makes some other explanation more probable, to the inference that their common intention was that she should share in the beneficial interest in the land conveyed. But it would not be reasonable to infer a common intention as to what her share should be without taking account also of the sources from which the mortgage installments were provided. If the wife also makes a substantial direct contribution to the mortgage installments out of her own earnings or unearned income this would be *prima facie* inconsistent with a common intention that her share in the beneficial interest should be determined by the proportion which her original cash contribution bore either to the total amount of the deposit and legal charges or to the full purchase price. The more likely inference is that her contributions to the mortgage installments were intended by the spouses to have some effect upon her share.

Where there has been an initial contribution by the wife to the cash deposit and legal charges which points to a common intention at the time of the conveyance that she should have a beneficial interest in the land conveyed to her husband, it would be unrealistic to regard the wife's subsequent contributions to the mortgage installments as without significance unless she pays them directly herself. It may be no more than a matter of convenience which spouse pays particular household accounts, particularly when both are earning, and if the wife goes out to work and devotes part of her earnings or uses her private income to meet joint expenses of the household which would otherwise be met by the husband, so as to enable him to pay the mortgage installments out of his moneys this would be consistent with and might be corroborative of an original common intention that she should share in the beneficial interest in the matrimonial home and that her payments of other household expenses were intended by both spouses to be treated as including a contribution by the wife to the purchase price of the matrimonial home. (...)

On what then is the wife's claim based? In 1951 when the house was purchased she spent about £190 on buying furniture and a cooker and refrigerator for it. She also paid about £30 for improving the lawn. As furniture and household durables are depreciating assets whereas houses have turned out to be appreciating assets it may be that she would have been wise to have devoted her savings to acquiring an interest in the freehold; but this may not have been so apparent in 1951 as it has now become. The court is not entitled to infer a common intention to this effect from the mere fact that she provided chattels for joint use in the new matrimonial home; and there is nothing else in the conduct of the parties at the time of the purchase or thereafter which supports such an inference. There is no suggestion that the wife's efforts or her earnings made it possible for the husband to raise the initial loan or the mortgage or that her relieving her husband from the expense of buying clothing for herself and for their son was undertaken in order to enable him the better to meet the mortgage instalments or to repay the loan. The picture presented by the evidence is one of husband and wife retaining their separate proprietary interests in property whether real or personal purchased with

their separate savings and is inconsistent with any common intention at the time of the purchase of the matrimonial home that the wife who neither then nor thereafter contributed anything to its purchase price or assume any liability for it, should be nevertheless entitled to a beneficial interest in.

Both Buckley J and Edmund Davies LJ in his dissenting judgment in the Court of Appeal felt unable on this evidence to draw an inference that there was any common intention that the wife should have any beneficial interest in the house. I think that they were right. Like them I, too, come to this conclusion with regret, because it may well be that had husband and wife discussed the matter in 1951 when the house was bought he would have been willing for her to have a share in it if she wanted to.

But this is speculation, and if such an arrangement had been made between them there might well have also been a different allocation of the household expenses between them in the ensuing years. If, as I hold, she has no interest in the matrimonial home in which she is still living, this will no doubt affect her claim for maintenance under the Matrimonial Causes Act of 1965.

I would allow the appeal and declare that the sole beneficial interest in the house is vested in the husband, but would impose a stay upon the sale of the house for 3 months to give the wife an opportunity of applying in the matrimonial proceedings for appropriate relief. The husband should have his costs before Buckley J and in the Court of Appeal.

Appeal allowed.

I v I [1970]

HIGH COURT OF KENYA AT NAIROBI

TREVELYAN J

Date of Judgment: 25 November 1970

Case Number: DC 19/70

SOURCED BY: EA LAW REPORTS

CITATION: [1971] EA 2786²⁶

Importance

I v I is the first reported decision of the Kenyan High Court where the MWPA of England was held to apply to Kenya. The court also considered various English authorities and made a finding on the presumption of advancement.

[1] Family law – Property – Jointly owned by the spouses – Husband used most of the proceeds from its sale to acquire some property in his own name – Application by husband for determination of wife’s interest in the property – Whether the Married Women’s Property Act is a statute of general application – Whether it applies in Kenya.

[2] Family law – Presumption of advancement – Property acquired from husband’s income – Subsequent joint registration – Whether presumption of advancement applies – Whether wife’s undivided half share in the property was held in trust for her husband.

Editor’s Summary:

The husband in this case had acquired a property in England from his earnings and had it registered in the joint names of the spouses. The house was subsequently sold and most of the proceeds used to purchase a house in Kenya which was transferred into the husband’s name. The wife had expected that the subsequent property would go into their joint names.

The question before the Court was whether the Married Women’s Property Act of 1882 of England (MWPA) would apply to Kenya. Further, whether the presumption of advancement to the wife as a result of the initial transfer to herself of a half-share had been rebutted.

Held:

1. The MWPA was a statute of general application in England on 12 August 1897. It would therefore apply in Kenya so far as the circumstances of Kenya and its inhabitants permit. The MWPA would apply in priority to customary law. Judicature Act (Chapter 8), section 3 considered.

2. The presumption of advancement may be rebutted where property was acquired for the joint use of the spouses. *Silver v Silver* [1958] 1 All ER 523, *Rimmer v Rimmer* [1953] 1 QB 63 approved. The presumption that the property was conveyed to the wife for her own use is however not rebutted if the transfer was effected to defeat creditors. *Tinker v Tinker* [1970] 1 All ER 540.
3. In this case, there was a post-nuptial settlement between the parties in relation to the property of the marriage. The word 'settlement' should be given a wide construction. Hence, the Court has power under section 28 of the Matrimonial Causes Act (K), which is applicable in this case. *Tunstall v Tunstall* [1953] 2 All ER 310 considered; *Prinsep v Prinsep* [1939] page 225 adopted.
4. The husband in this case had not shown any reason for variation of the postnuptial settlement between the spouses.

Assessment

It is not easy to critique a case that stands at the foundation of three decades of jurisprudence on the family law of property in Kenya. The facts of the case to a great extent speak for themselves. Still, one notes, almost wistfully, that the Court was blissfully unaware of the remarkable developments in English law by the two House of Lords decisions analysed above. The ramblings of the English Lords against the presumption of advancement went unheeded by this court.

This case is interesting because it involves an application under the MWPA by the husband. The subject matter of the dispute was some jointly owned property acquired solely from the husband's earnings. The question that arises is whether the fact of joint ownership alone would impute an intention that the beneficial interest in the property be shared between the spouses. The court analysed well the relation between a presumption of advancement and a presumption of resulting trust: the two are mutually exclusive. It is noteworthy that the Court in this case, without the aid of *Gissing*, was able to draw accurate conclusions on the juxtaposition of trust and advancement in a MWPA application.

Surprisingly, the decision of the Court did not consider the MWPA exclusively, but also made reference to the Matrimonial Causes Act (K). Section 28 of this Act provides for application of settled property which is the subject of an ante-nuptial or post-nuptial agreement. It is difficult to follow the ratio of the Court in concluding that there existed a settlement between the parties. On what basis, one would ask, would the Court conclude that the property acquired during the marriage formed part of a settlement?

Whatever would turn on a proper interpretation of section 28, it is clear that sections 25 to 31 of this Act (on ancillary relief) read together, form the extent of the substantive provisions entitling a court to exercise its discretion and distribute property, or the interests in property, between the spouses. Under section 27, the property in possession or reversion of the wife may be settled on the children of

the marriage or the innocent party if the estrangement of the parties was caused by the adultery, desertion or cruelty of the wife.²⁷ Under section 28, only property that is subject of a post-nuptial or ante-nuptial settlement may be applied according to the Court's discretion to the parties of the marriage.

27 It is interesting to note that this provision of law, so unabashedly in favour of husbands and punitive to wives, still stands in our statute books. Of course one may argue that the only remedy for an innocent husband is settlement of the wife's possessionary or reversionary interest in property while the remedy for an innocent wife is an order for alimony or maintenance. Still, it is hard to justify why only the wife would lose her property rights on account of causing the divorce.

KARANJA V KARANJA [1976]

HIGH COURT OF KENYA AT NAIROBI

SIMPSON J

Date of Judgment : 29 November 1976

CITATION: [1976] KLR 307²⁸

SOURCED BY: KENYA LAW REPORTS

Importance:

Coming just five years after *I v I*, the Court in *Karanja v Karanja* happily considered the two fundamental English decisions on this area. The court, without expressing it, manifested discomfort at *Pettit*, and side-stepped its ratio after quoting from the decision. This case is important because it began the arduous path of applying the principles enunciated in *Pettit* and *Gissing* to local cases.

[1] *Family law – Property – Property acquired through joint contribution of both spouses – Registered in the sole name of the husband – Wife seeks declaration of joint ownership – Whether principles of trust apply to an African couple in salaried employment.*

Editor's Summary

During the course of their marriage, the parties acquired several properties which were all registered in the name of the husband. One property was acquired from money supplied by the wife while the other properties were acquired with her direct or indirect contribution. The court considered whether customary law would operate to disqualify any imputation of trust in favour of a married woman, especially one in salaried employment.

Held:

1. The Married Women's Property Act is applicable to Kenya, and customary law is subject to any written law. *I v I* [1971] EA 278 followed.
2. Even without power to transfer property, the Court has power under the MWPA to grant declarations of ownership of property. *Pettit v Pettit* considered. In cases where the property was acquired as a joint venture, it will be regarded as belonging to the spouses jointly no matter in whose name the property stands. *Chapman v Chapman* [1969] 3 All ER 476 approved.
3. The absence of an agreement or intention that the contributing spouse share beneficially in the property does not exclude the imputation of such an intention.

This will depend on the law of trust, which will not distinguish between direct and indirect contribution. *Gissing v Gissing* [1970] 2 All ER 780, *Falconer v Falconer* [1970] 3 All ER 449, *Hazell v Hazell* [1972] 1 All ER 923 adopted.

4. Where an African husband and wife are in salaried employment, the imputation of a trust cannot be rejected outright. This implication would arise where the wife is contributing indirectly through payments for household and other expenses which the husband would otherwise have had to pay.
5. In this case, the husband held the immovable properties in dispute in trust for himself and his wife in proportions of two to one respectively. However, it would not be equitable to order sale or possession of the Karen property since the husband was residing there with his new family.

Assessment:

The court properly interpreted *Pettit*, that the absence of a power to transfer property does not imply lack of a power to declare property rights whose beneficial ownership is different from their legal ownership. The court was prudent in applying the ratio of the English cases it cited to an African setting, preferring only to extend them to an African couple in salaried employment.

However, the Court did not have benefit of full argument on the question of whether it had power to order sale of any part of the defendant's property and payment of the proceeds to the plaintiff. It is doubted whether it was intended under the Married Women's Property Act to give such a power to a Judge in cases where the defendant is willing to recompense the plaintiff's beneficial interest after valuation of the property.

The final decision of the Court to award one-third beneficial interest in the properties to the wife is commendable. The court displayed awareness that a determination of property rights, as held by *Gissing* need not be based on an application of the maxim 'Equality is equity'. A proper determination could involve the award of a share either less than or even more than half the beneficial interest in the disputed property. Two decades later, Court of Appeal benches in *Essa v Essa* [1995] LLR 394 (CAK) and *Nderitu v Nderitu* [1997] LLR 606 (CAK) were still struggling to come to grips with this principle of distribution.

NJUGUNA v NJUGUNA [1986]

HIGH COURT OF KENYA AT NAIROBI

SACHDEVA J

Date of Judgment :MARCH 1986

Case Number: 2821/82

Sourced by: LAWAFRICA

CITATION [1982] LLR 823 (HCK)

Importance

The general absence of legal principles indicates the gradual blurring of the law of property between spouses.

[1] Family law – Property acquired and registered in husband's name Wife made financial contributions to the property Conflicting evidence of the spouses Evidence of contribution Whether wife has beneficial interest in the property.

Editor's Summary

The parties were man and wife. During the course of their marriage, the husband acquired a rural property, the suit premises. There was conflicting evidence of how the parties had ordered their Marriage and arranged their financial affairs. However there was some evidence that the husband had been unemployed for over one year and that the wife had made financial contributions to the property. On an application for determination of her share in the property,

Held: The wife had satisfied the Court of her direct and indirect financial contributions to the property. The court would therefore follow *Karanja v Karanja* to declare joint ownership of the property assessed in equal shares. *Karanja v Karanja* [1976] KLR 307 followed.

Assessment

The court did not delve deeply or at all into the applicable legal principles, but minimised its function to assessment of evidence. This was a dangerous posture, which would easily lead to a disappearance of the elaborate principles in *Gissing v Gissing* [1970] 2 All ER 780 and *Pettit v Pettit* [1969] 2 All ER 395.

Case referred to in judgment

Karanja v Karanja [1976] KLR 307

Judgment

The above case was heard by the late Ouma J. When the Learned counsel for the parties appeared before the then Chief Justice, they consented that the proceedings

before Ouma J should be typed and since they had already made written submissions, the judgment could be written by another Judge. I have now been directed to prepare the judgment. It will thus be appreciated that I have had no opportunity of observing the demeanour of the witnesses and that I only have the written word to go by.

The applicant had taken out this originating summons for orders [that various properties are owned jointly by the parties and the same be sold and the proceeds divided equally between them].

The application is supported by the affidavit of the applicant who deponed, briefly, that her marriage to the respondent which took place on 11 January 1975, was dissolved on 25 February 1982 but that in the meanwhile they have had 2 children a girl and a boy, that at the time of the marriage she was employed as a bank clerk at a salary of KShs740 per month while the respondent was employed as a sales representative with Raymonds Woollen Mills, that he was unemployed from February 1975 to March 1975 during which period she was solely responsible for running the home, that they had a joint account with Housing Finance Company of Kenya Ltd, from which the respondent withdrew money to buy the family car which was subsequently sold and they bought a farm in Murang'a which was however registered in the defendant's name alone. That when the respondent was re-employed in 1977 he was responsible for paying house rent and she was responsible for buying food and paying water and electricity bills, that she also contributed money for fencing and cultivating, that during the subsistence of the marriage she rendered numerous unpaid services of a domestic, personal and wifely nature to the respondent as well as caring for their children, that during their marriage she made substantial contributions to the running of the home generally and family ventures, and that in February 1980 she took a loan of KShs14 000 from her employers out of which she gave the defendant KShs 8 500 to buy a kiosk at the Kenyatta Market but that he has excluded her from that kiosk and is taking all the income therefrom.

In his replying affidavit the respondent did not agree with the applicant's affidavit he deponed that he resigned his job in July 1975 to enter into business but did not do so and instead started a small textile business in a corner of a shop belonging to one SN Muchiri where he stayed from August 1975 until March 1977 when he was employed by Firestone East Africa (1969) Limited and he closed his textile business; that all this time he had a regular income and was looking after his family both domestic and 'otherwise' and the applicant was contributing nothing at all; that the account with the Housing Finance Company was opened with about KShs 2 000 which was donated to them as wedding gifts and he later 'pumped' money into it from loans, borrowings and savings while the applicant contributed nothing to it but she nevertheless continued to operate the account and took all the moneys from there which she put into her own use without his knowledge; that he had bought the land with his own money, without any

contribution from the applicant; that he did not sell his car to buy the land; that he 'footed' all expenses including expenses for fencing and cultivation from his own money and she did not buy food or pay for water and electricity; that she did not render any domestic personal and wifely unpaid services or care for the children because she was a woman of loose morals, a drunkard and was rarely at home while he ran the home and met all expenses single-handed; that she had lent to him Shs 8 500 not in order to buy a kiosk but for his own use and after she left the matrimonial home he refunded that sum to her together with interest of Shs 1 000; that he did not buy a kiosk and has never owned any kiosk; that when the applicant left the matrimonial home not only did she take her own property but also a lot of his property which he had acquired personally; and that in all' these circumstances the applicant's originating summons should be dismissed with costs.

(... His Lordship then considered the evidence)

Doing the best that I can upon all evidence before me as a whole – which I have not considered it necessary to set out in full – I find the testimony of the applicant much more cogent and acceptable than that of the respondent and his witnesses.

From the evidence on the record I find that the applicant was paying for a lot of household expenses like water, electricity, foodstuff etcetera from her own resources during the substance of the marriage.

(His Lordship concluded that the husband had been unemployed for a time, and that the land in dispute was acquired during the marriage. The wife had made financial contributions to the acquisition of the property.)

Upon the evidence on the record, I entertain no doubt that the applicant contributed very substantially towards the purchase of (the Murang'a Property), and I assess her share in it at 50% doing the best that I can upon the evidence before me.

As to the third prayer of the applicant in her originating summons I find the evidence vague and inconclusive. While I have no doubt that the applicant must have contributed towards the purchase of household goods and furniture etc., she is unable to pin-point any specific item or place any specific values etc. On the whole I find that the third prayer has not been satisfactorily proved and I make no orders in respect of that.

The law applicable to this sort of case has been well stated in *Karanja v Karanja* [1976] KLR 307, and there seems to be no dispute about it. To sum up, (the Murang'a property) is hereby declared to be jointly owned by the applicant and the respondent in equal shares and it must be sold, and its proceeds equally divided between the two of them. However, each of them is at liberty to buy out the other at an agreed price if they so chose. In the meanwhile, the applicant's caution will remain lawfully registered against that land.

KIVUITU v KIVUITU [1991]

COURT OF APPEAL OF KENYA AT NAIROBI

GICHUHI, MASIME JJA AND OMOLO AG JA

Date of Ruling: 21 MARCH 1991

Case Number: 26/85

SOURCED BY: LAWAFRICA

CITATION: [1985] LLR 1411 (CAK)

Importance

It was the first time that the Court of Appeal considered whether the non-monetary contribution of a typical Kenyan housewife would be at par with indirect financial contribution of a wife in salaried employment. The court also adopted various dicta of English decisions, hence importing the wealth of English jurisprudence into our local jurisdiction.

[1] Family law – Property of spouses – Matrimonial home purchased from husband's finances – Property registered in joint names of the parties – Husband still living on the property – Whether wife had made any financial contribution – Whether wife's non-monetary contribution would be considered – Whether property held in equal shares by virtue of joint ownership – Whether wife's share held in trust for her husband – Whether court entitled to make an order for sale of the matrimonial property – Section 17 Married Women's Property Act.

Editor's Summary

The defendant and plaintiff married in 1966 and began cohabiting as husband and wife. The husband was a Member of Parliament. In 1970 he entered into an agreement with M to purchase a house for KShs 160 000 and paid the deposit of KShs 20 000. Dissatisfied with the location and security of the house, he agreed with his wife to purchase another house at a different location. He went on a three month trip abroad to attend a UN assembly and left his wife in charge of obtaining alternative property. The wife was in constant correspondence with her husband, and she eventually located an ideal matrimonial home, the Garden Estate property.

The wife signed a Memorandum of Understanding for purchase of the property for KShs 170 000. The deposit of KShs 17 000 was paid by the wife out of moneys obtained from a business owned by the husband and a third party. The husband paid the balance from his salary. When the husband returned from abroad, his attempt to register the property in his sole name was promptly rejected by the wife. The property was hence registered in the joint names of the spouses.

In 1972 the marriage broke down and a decree for divorce was granted. The wife moved out of the matrimonial home but the husband remained in the home

with the children. The husband subsequently remarried. Nine years later in 1981 the wife by originating summons applied to the High Court for orders that the Garden Estate property, being the matrimonial home of the spouses be sold and the proceeds be shared equally between the parties. The trial Judge found that the wife had not contributed to the purchase of the property and was only entitled to a 20% share therein. The Judge also ordered an account to be taken of the rental income and that a one-fifth share be paid to the wife.

The wife appealed on the grounds that she had contributed to the property, and that in any case her title as joint tenant was absolute and entitled her to a half share in the property. The husband cross-appealed, arguing that the Judge erred in awarding the wife 20% share after finding no contribution. He argued that the wife held her share as a trustee of the husband, and further that the Judge had no jurisdiction under section 17 of the Married Women's Property Act to order the taking of accounts on rental income.

Held:

1. The husband purchased the property in question intending it to be the parties' matrimonial home and the same was registered in their joint names without setting out their respective shares therein. However, to decide the matter simply on the issue of whether the wife had made a financial contribution to the acquisition of the property is to establish too narrow a compass for the issues raised herein.
2. Where the husband and wife had both made financial contributions to the acquisition of the matrimonial home, direct or indirect, and the house was acquired as a joint venture without reserving separate interests, they would both be held to have acquired an interest in the home. *Chapman v Chapman* [1969] All ER 476 adopted.
3. Where both spouses made financial contributions to the acquisition of the matrimonial home but the house was registered in the sole name of one of the spouses, the question of whether the house belonged to them jointly, in equal or unequal shares, is dependent on whether the law imputes on the party with title an intention to create a trust from his/her conduct and the surrounding circumstances. An inference of trust would readily be made where both parties made a substantial contribution to the purchase price, whether directly or indirectly. The question of whether the parties held equal shares would depend on their respective contributions. *Falconer v Falconer* [1969] 1 All ER 449 adopted.
4. Section 17 of the Married Women's Property Act applies to African spouses in Kenya where both are in salaried employment and contributing to household expenses. The fact that the property acquired during coverture is put into the name of the husband, and he evinced no intention that his wife should share in it does not necessarily exclude the imputation of a trust. *Karanja v Karanja* [1976] KLR 3 07 followed.

5. In a typical Kenyan family where the wife is employed as a full-time housewife doing the chores of the home or is left in the rural home tilling the land, even though her monetary contribution cannot be easily quantified, she would still have contributed to the acquisition of the 'family assets'. So where the husband acquires any property and registers it in the joint names of the spouses, such property being 'family assets' is owned in equal shares. Where however the property is registered in the sole name of the husband, then the wife could still apply to court to assess the value of her non-monetary contribution.
6. In this case, the wife contributed indirectly, both non-monetarily as a wife and financially through her alternative employment/business, to the property. The property was acquired as 'family property' and registered as a joint venture, showing clear intention of joint ownership in equal shares. Section 22(4)(a) Registration of Titles Act and section 28 Registered Land Act considered; *Patel v Commissioner of Land* [1980] KLR 38 distinguished.
7. The order for taking of accounts would not stand because neither party had prayed for it. Further, section 17 does not give a right of sale but a determination and declaration of the wife's share in the property. Since the husband is still living in the property with the children of his two marriages, the order for sale of the property would be replaced by an order for valuation of the property and payment to the wife of half its value. *Bedson v Bedson* [1965] QBD 666 adopted.

Appeal allowed in part, cross-appeal dismissed.

Assessment

This case puts forward the proposition that when the husband acquires property and registers it in the joint names of the spouses, the wife would be taken to have acquired an interest to a half-share therein. The application of the doctrine of resulting trust to jointly owned properties is implicitly rejected on the assumption that the wife can always be taken to have given some contribution in exchange for the transfer of title to the joint names of the spouses.²⁹

The decision in this case could be criticised for the failure to clearly reject the application of a doctrine of community property in Kenya. The use of the term 'family assets' by Omolo J involved the risk of eventually obscuring the principles of determination of matrimonial property. While Omolo J's emphasis on contribution in this case arose from the fact of joint ownership of the property, his characterisation of contribution as including even just the ordinary duties of wife and mother laid the gates open to a *defacto* application of community property regimes of spousal property in Kenya.

²⁹ But see *Wanjiku v Mutiso* *infra* page 141 where the husband transferred title to the wife after he was imprisoned. The court allowed the husband to recover absolutely the entire title to the property.

Cases referred to in judgment

East Africa

Karanja v Karanja [1976] KLR 307

Patel v Commissioner of Lands [1980] KLR 3 8

United Kingdom

Bedson v Bedson [1965] QBD 666

Chapman v Chapman [1969] All ER 476

Falconer v Falconer [1969] 1 All ER 449

Judgment

OMOLO AG JA: My Lords we have before us an appeal and a cross-appeal filed by Mary Ann Mutanu Kivuitu and Samuel Mutua Kivuitu respectively against the judgment of the High Court at Nairobi (Aganyanya J) by which it was ordered that the parties, who were once a husband and wife, owned property known as LR No 4894/11 Garden Estate, Nairobi, in the proportion of one to the wife and four to the husband. With the consent of the parties, we consolidated appeals. Though the parties have been divorced for a long time, I shall, for ease of reference, simply refer to them as husband and wife. On the 10 September 1981, the wife took out an Originating Summons under section 17 of the Married Women's Property Act of 1882, the Judicature Act (Chapter 8), the Matrimonial Causes Act (Chapter 150) sections 27 and 28, and all other enabling provisions of the law and in her summons she prayed for orders:

1. That the property (that is LR 4894/11, Garden Estate, Nairobi) having been the matrimonial home of the plaintiff and defendant herein and consequent upon the decree of divorce granted in High Court Divorce Cause number 34 of 1972 between the parties herein, the Court be pleased to order that the property known as LR number 4894/11 Garden Estate, Nairobi, be sold and the proceeds be shared in equal shares to the plaintiff and the defendant.
2. That the plaintiff herein be given the first option in the said sale of LR number 4894/11, Garden Estate, Nairobi.
3. That the defendant be ordered to execute all necessary transfers to the plaintiffs or other purchaser's name and that in default the Registrar of the High Court of Kenya or any other such officer be authorised to execute the same instead of the defendant.
4. That cost be paid by the defendant."

Those prayers were strenuously opposed by the husband and the matter went for a full trial in the High Court which after the trial made the order I referred to earlier.

The wife was dissatisfied with that order and she appealed, listing four grounds namely:

- “1. The Learned Judge erred in fact in finding that the appellant contributed nothing towards the purchase price of the disputed property.
2. The trial Judge erred in fact in finding that the appellant and the respondent jointly owned the disputed property in the proportions of one to four and not in equal shares.
3. That the trial Judge erred in law in failing to find that the appellant’s title as joint tenant to the disputed property was and is absolute and indefeasible.
4. That the trial Judge erred in fact and in law in failing to find that the appellant and the respondent held the land in equal undivided shares.”

The husband was also dissatisfied with the order made by the Judge and he in turn cross-appealed and listed four grounds, namely:

1. The Learned Judge having rightly found as a fact that:
 - (a) the deposit for the purchase was paid by the appellant/defendant and the balance was also paid by monthly instalments deducted from the defendant/appellant’s salary
 - (b) though the initial agreement was made by the plaintiff/respondent, the same was made by her on the instructions of the defendant/appellant
 - (c) there was no sufficient evidence of the plaintiff/ respondent’s financial contribution either directly or otherwise towards the purchase of the disputed property
 - (d) there was no contribution by the plaintiff respondent during he short period of employment which could have relieved the appellant from expenditure he otherwise would have had to bear erred in law and fact in holding that the plaintiff/respondent and defendant/appellant jointly owner the disputed Property in proportions of one to four respectively. On the contrary as a necessary sequel the Learned Judge should have held that the plaintiff/ respondent was holding ½ share in the said property as a trustee of the defendant/appellant and the register in respect of the said property be rectified to read defendant/appellant as the sole proprietor.
2. The Learned Judge erred in ordering accounts of the rental income from the said property to be taken and further erred in ordering the payment of the one forth (*sic*) of the same to the plaintiff/respondent despite the fact that the rental income derived from the extension (*sic*) and renovation done by the appellant exclusively at his own expenses (*si*).

3. Alternatively the Learned Judge had no jurisdiction under section 17 of Married Women's Property Act to order an inquiry or accounts of the rental income from the said property that was non-existent at the time of making such order.
4. The Learned Judge erred in awarding remedy which was not prayed nor canvassed by the respondent at any stage of the proceedings."

I have found it necessary to set out all the grounds contained in the appeal and the cross-appeal; they starkly bring out the conflicting claims of the parties over the disputed property and it is those claims which the High Court was called upon to resolve and did attempt to resolve. It is the same claims we are now called upon to resolve. There was no dispute on the recorded evidence that the disputed property was registered in names of the husband and the wife and the registration did not set out the shares party. There was equally no dispute on the recorded evidence that the husband bought the property intending that it was to be their matrimonial home. (...)

It is clear beyond any doubt that the husband who is an advocate and who was then a Member of Parliament was then married to the wife and he was in search of suitable premises in which they could set-up a home for the family. He had got such premises from one MacDonald or McDonald but he was not happy with its security as a family residence and hence the need to look for another one, particularly at Garden Estate where a previous neighbour at Woodley estate had bought a home. These are the circumstances in which the disputed premises came to be acquired and like the Learned trial Judge I have no doubt that the property was acquired as the matrimonial home of the parties.

The property was purchased for KShs 170 000. A deposit of KShs 17 000 was required. The husband was then in New York, attending the sessions of the United Nations General Assembly. It was accordingly the wife who looked for the property and on the 22 November 1970 entered into a Memorandum of Agreement of Sale/Purchase, see exhibit 1. In her evidence before the Judge, the wife appeared to contend that she was buying the property on her own but that contention is not tenable on the evidence. If that had been so, there would have been no need, for her to be in constant communication with the husband as is shown by the various letters she wrote to him over the subject and which letters were produced before the Judge.

The husband in turn contended that the wife was simply acting as his agent and that is clear from the passage I have already quoted. This contention of the husband was based on the theory that the wife had no source of income of her own, and therefore she could not have bought the house either on her own. There was clear evidence that the money came from a business called Kona or Comer Wholesalers. That business was a partnership owned by the husband and one Mulu Mutisya. The husband contended that he instructed Mulu Mutisya to release to the wife the KShs 17 000 and that this was done. He later paid back the money. The wife's

contention was that she borrowed the money from the business and later refunded it with money obtained from her own business or businesses. The Learned Judge found for the husband on this point holding that she “was not able to support her contention in any material sense”. Mrs Njoka for the wife attacked this finding, arguing that by the phrase ‘in any material sense’ the Judge meant the wife had failed to adduce documentary evidence in support of her claim that she had refunded the KShs17 000 to Kona Wholesalers. I agree with Mrs Njoka that in these circumstances, it is difficult to expect parties to keep a record of the transactions involved in the acquisition of a family home, but for my part I really do not wish to decide the matter simply on the issue of whether or not the wife had in fact made a financial contribution to the acquisition of the property. That, in my view, is too narrow a compass within which to confine these serious issues. The question must be the nature of the contribution that a wife or husband has to make before she or he can be held to have acquired a share in the matrimonial home. Must such contribution simply be of a financial authorities to which we were referred dealt with situations in which one or the other of them have made a financial contribution, direct or indirect, to the acquisition of the family home. *Chapman v Chapman* [1969] All ER 476 involved a situation in which the husband and wife put all their financial resources into the purchase of the house without reserving separate interests, and as a joint venture and accordingly, they were held to have acquired interests in the home.

In *Falconer v Falconer* [1969] 1 All ER 449 the money to purchase the land on which the matrimonial house was built was contributed wholly by the wife but both parties made contribution to the expenses for constructing the matrimonial home. In those circumstances reasonably held the principles applicable to whether a matrimonial home standing in the name of the wife or the husband alone belonged to them both jointly (in equal or unequal shares) were the law imputed to the husband and the wife an intention to create a trust for her by way of inference from their conduct and the surrounding circumstances; and that an inference of trust would be readily drawn when each had made a substantial contribution to the purchase price or to the mortgage installments, either directly, or indirectly as where both parties went out to work and one paid the keeping and the other paid the mortgage installments; but whether the parties held in equal shares would depend on their respective contributions. In the *Falconer Case* (*supra*) the matrimonial home was registered in the wife’s sole name. *Karanja v Karanja* [1976] KLR 307 which was cited in the High Court and mentioned before us was decided by court and held, as per the head note:

“Kikuyu customary law has changed radically since the days when land belonged to the tribe and section 17 of the Married Women’s Property Act of 1882 of England together with the English authorities decided there under is applicable to an African husband and wife in Kenya where both are in salaried employment and contributing to household expenses and the education children. The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that

his wife should share in the and necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances from obtaining declaration that the property acquired by virtue of a joint venture trust for them both.”

What is clear from this line of authorities is that both spouses were found to have made a contribution, either the wife or the husband has paid so much money towards the purchase of the property. Again there is little difficulty in finding indirect financial contribution by one spouse where both the wife and husband are in salaried employment and the wife uses the income to pay household expenses such as food, clothing, school so on; such a spouse is making an indirect contribution to the purchase because the other spouse can then use his or her income to pay for the price. What about the ordinary housewife in Nairobi and other urban centres where this type of dispute is likely to occur? She remains in the house preparing food for the family, and keeping the house going. She ensures that the children are in a position to go to school in clean uniforms and that the husband also goes to work in clean clothes and generally attends to matters which enhance the welfare of the family. True, the money to do all these is often provided by the husband, but can it be said that such a woman is making no contribution to the family welfare and its assets?

Or take the not too uncommon situation in Kenya where the wife is left in the rural home tilling the land and generally keeping such home going. The husband is in paid employment in an urban centre and probably sends money home to the wife at the end of each month. The wife may, apart from running the home, be growing and looking after crops such as tea, coffee maize and such. She may even be left with the children who attend rural schools. The husband using money from his job acquires property in the town. Can such a wife be said to have contributed nothing towards the acquisition of such property and can only depend on the charity of the husband?

For my part, I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of the property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even a bigger contribution on to the family welfare by tilling the family land and producing either cash or food crops. Both of them, however, make a contribution to the family welfare and assets. So that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specify any proportions, the Courts must take it that such property, being a family asset, is owned in the equal shares. Where, however, such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to the Court under section 17 of the Married Women's Property Act of 1882, so that the Court can determine her

interest in the property and in that case, the Court would have to assess the value to be put on the wife's non monetary contribution. I can find nothing *Chapman v Chapman*, *Falconer v Falconer*, or *Karanja v Karanja* (*supra*) which would force me to the conclusion that only monetary contribution must be taken into account. Any such limitation would clearly work an injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by.

The wife in the present dispute, however, can hardly qualify as simply housewife. The husband contended that she made no contribution at all and the Judge appears to have accepted this, but this position was hardly supported by the evidence. She looked for the property herself when the husband was out in United States and it was her who found the property and first signed the 'Memorandum of Agreement' of sale/purchase to which I referred earlier. This must be why the Judge refused to hold that she had contributed nothing. The husband contended she was acting on his instructions and as his agent but this cannot be right. She was clearly buying family property land kept the husband fully informed on the matter. The husband did not allege that he paid her to act as his agent or anything of that sort. When the husband came back and attempted to register the property in his sole name, she promptly rejected that attempt and the property was in fact registered in their joint names there was evidence that the wife was, for some periods, employed in various places earned various amounts as salary. True, the periods of employment were short and intermittent, and the salary was not as large as that of the husband, but the money still went into the budget. When she left paid employment she was involved in various business and the husband did not contend to and contrary. His contention was that he paid for the businesses and they were not profitable at all. The point, however, is that the wife was involved in businesses and that the husband was not paying her to run any of those businesses for him. The businesses might not have been profitable but they were not a dead loss. One business (Gallery Africa) was sold for KShs 65 000. Clearly the wife was making a financial contribution to the family income, either through paid employment or through these businesses. So that whether the original deposit of KShs 17 000 was paid by the husband he subsequently paid all the mortgage installments from his salary, the wife also made contribution to the family income. Her contribution might have been intermittent and not such as that of the husband but nevertheless contribution it was and upon the property being acquired it was registered in their joint names with no specification as to who owned what proportion. It was clearly intended to be family property jointly owned by the husband in equal shares and with respect to the leaned Judge the evidence on record did not warrant his conclusion that the wife owned $\frac{1}{4}$ while the husband owned the rest.

Even on the question of joint registration by itself, the law is more in favour of the wife than the husband. It is not very clear from the record under what Act the

disputed property was held, but section 22(4)(a) of the Registration of Titles Act provides:

“When two or more persons are entitled as tenants in common, the registrar shall issue to those persons one certificate of title for the entity describing them as tenants in common,” paragraph (b) of that sub-section gives the registrar the discretion to issue separate certificates person.

Section 23 of the Act provides:

“(1) the certificate of title issued by the registrar to a purchaser upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions, and conditions contained therein, and the title of that proprietor shall not be subject to challenge except on ground of fraud or misrepresentation to which he is proved to be a party.”

Section 28 of the Registered Land Act makes similar provision to the above. The husband challenges the wife's title on the ground that the wife was registered as a trustee for himself and the issue of trustee was based on the allegation that the wife had not made any contribution towards the purchase of the land. I have held that the wife in fact made financial contribution towards the purchase of the matrimonial home, and the Judge's finding to the contrary was not justified by the evidence. But even if I had been of the view that the wife had contributed no money at all towards the purchase of the home. I would gone on to assess her non-monetary contribution as a wife and put a value upon that. As I said earlier, it would clearly be cruel to the wife and to other women in her position that they can only have share in property acquired during marriage if they can prove some financial contribution. At any rate this wife made a financial contribution and she and her husband bought the property as a family venture and had it registered in their joint names. They clearly intended to hold in equal shares as a family asset. We were referred to the case of *Patel v Commissioner of Lands* [1990] 1 KLR 38 where the late Mrs Kiano was jointly registered with Dr Kiano as proprietors of some land. The court held that she was still a trustee for Dr Kiano because she had contributed nothing towards the purchase of the land. I think the decision in that case should be confined strictly to the notorious fact that Mrs Kiano had been deported from Kenya. She was accordingly not in a position to present her side of the story to the Court and though service upon her was effected upon a firm of local advocates, there was no evidence at all that those advocates were able to receive instructions from her. Dr Kiano asserted in a letter that she had contributed nothing and the Judge accepted that assertion. The Judge also appears to have found that Mrs Kiano had in fact abandoned her claim to the land. That decision was probably right in those peculiar circumstances but it must not be extended beyond those circumstances. That being my view of the matter, I would allow the

wife's appeal and dismiss the husband's cross-appeal with costs. I would set aside the Learned Judge's order that the parties are entitled to property in the ratio of one to four and substitute it with an order that they hold the property in equal shares. I would also set aside the Judge's order that the taking of accounts of rental income, which order was not prayed for by either party. The wife had also asked for an order that the property be sold and the proceeds shared equally between the parties. I would instead order that a valuation be carried out on the property by a valuer acceptable to the parties and upon such valuation, the husband should pay the wife half the value of the property. The cost of the valuer is to be borne equally by the parties. I would award to the appellant 2/3% of her costs of this appeal.

GACHUHI JA: The root cause of these appeals was an originating summons filed by Mary Ann Mutanu (wife) against Samuel Mutua Kivuitu (husband) under section 17 of the Married Women's Property Act of 1982 and other provisions of the law. As a result of the judgment in the first instance in which the Court ordered a valuation of the property and the said valuation to be in proportion as to 1/4 to the wife and 3/4 to the husband, each party filed the appeal challenging the apportionment by the Judge. Both appeals were consolidated by consent.

The facts relating to the subject matter of the appeal are set out in the judgment of Omolo Acting JA which I had the advantage of reading in draft. I entirely agree with him.

The Married Women's Property Act of 1982 is one of the Acts of general application in Kenya. Customary Law in relation to the ownership of property, if applied, would be in contradiction of section 17 of the Married Women's Property Act of 1882 of England. This provision discussed by Simpson J (as he then was) in *Karanja v Karanja* [1976] KLR 307.

This was at the time when an African woman was presumed to own nothing and all that she owned belonged to her husband and she was regarded as a chattel of her husband and this time has long gone. Women are more honourably employed in highly salaried posts and occupy high positions equal to men both in the Government and in the private sector. They own businesses and properties individually or in partnership and have shares in companies. There is no position that a man can hold which cannot be held by a woman. The situation has changed and so have customs.

Returning to the issue in this appeal there is evidence that both husband and wife as a married couple agreed to buy a house to be occupied by them as a matrimonial home. When the husband was away, she found a suitable home the price for which she negotiated and entered into, a sale agreement with the owner. She kept her husband fully informed of the progress. On return of the husband, the property was conveyed to them as joint tenants. The wife was at times employed and at times was in business. She must have assisted in domestic matters while the husband paid the mortgaged loan. The parties have children. Their marriage broke

down later. Divorce proceedings were instituted and the marriage was dissolved. The wife moved away from the matrimonial home while the husband remained with the children occupying the matrimonial home and has now remarried. The wife prays that the matrimonial home be sold and the proceeds be shared equally and that she be given an option to buy.

The fact the property is registered in their joint names, it means, that each party owns an undivided equal share therein. Again section 17 does not give the right of sale but a determination and declaration of the wife's share in the property. In *Bedson v Bedson* [1965] QBD 666 where the husband used all his life's savings to buy a draper's business consisting of the shop on the ground floor and living accommodation above, for the purpose of providing a home and 'means of livelihood' the Court of Appeal refused to grant an order of sale as the result would turn the husband out of the home.

In the present appeal, because of the contribution at the initial stages of the negotiation, I accept the findings of the Judge that the wife contributed either in cash or kind towards the purchase of this property. Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time 'that the intention of the parties was to hold the matrimonial home as joint tenants providing that if one of them died, the other would take the entire ownership. The wife having left the matrimonial home has not lost her interest. That position remained and cannot be altered. I would allow this appeal and set aside the judgment of the High Court and substitute therefore an order that both husband and wife are entitled to one-half undivided share of the property. Because the husband is occupying the matrimonial home with the children of the first marriage and with the wife and children of the second marriage, I would not grant an order for sale but I would order that the property be valued by a professional valuer to be agreed by both parties.

I am in agreement with the final orders proposed by Omolo Acting JA that this court should make.

As **MASIME JA**: also agrees, it is so ordered.

MASIME JA: By consent of the parties we consolidated these appeals as they arose out of the superior decision in High Court civil case number 2638 of 1981 (OS). The pleadings and competing claims parties in the originating summons, the decision thereon by the parties to these appeals have been succinctly summarized by Omolo Acting JA in his judgment which I have had the advantage of reading in draft and which I agree.

In view of the importance of this matter in the development of the law, I wish to add the following.

Most of the Kenya African communities are patrilineal and the matrimonial home is usually owned by the husband. Consequently upon divorce it is usual for

the wife to leave that home. In the process the wife will usually take away only her self-acquired personal property; any which belongs to the matrimonial home and landed property invariably remain with the husband. (See Cotran: Restatement of African Law: Marriage and Divorce of 1968). However, as a result of increased opportunity for education, employment and entrepreneurship the money sector is no longer the man's domain. And even where only the husband is income earning the wife is not relegated to total dependence on him without an ability to make some reasonable contribution towards the economic management of their family. It is no longer right to assume, as was done under customary law that the wife was totally dependent on the husband and incapable of contributing at all or substantially to the development of the household and increase in the family wealth. Apart from that it is fashionable today for betrothed couples to have pre-wedding and wedding parties during which many gifts are given to them for setting up of their matrimonial home. It is known that some gifts included land and property. It would be in my view wrong if upon divorce the wife was permitted to take away only her personal effects and any other property that she can be proved to have acquired directly through her own efforts. It is incumbent on this courts to consider all the factors and the circumstances in each case, to evaluate and determine whatever the nature of the wife's contribution and in findings to apportion the matrimonial property accordingly on divorce.

It is for these reasons that I concur in Omolo Acting JA's approach in these appeals. The matrimonial property in issue was clearly purchased as such and on the evidence both parties contributed towards its purchase and my analysis and evaluation of the evidence at the trial does not lead me to any reason to find that the wife contributed any less to the acquisition of property than the husband. I would therefore allow the appeal by the wife and declare that the property is owned by the parties in equal shares. In view of the cost of acquisition of property today however, I would not order that matrimonial home be sold: rather, I would direct valuation of the property by a valuer acceptable to both parties and order that the husband pay out to the wife the equivalent in money of one-half the value of the property; I would also order the husband to the valuation costs initially and recover half thereof from the wife's ultimate share. I would allow half of costs of this appeal to the wife.

ESSA v ESSA [1996]

COURT OF APPEAL OF KENYA AT NAIROBI

GACHUHI, OMOLO AND LAKHA JJA

Date of Ruling: 16 January 1996

Case Number: 101/95

Sourced by: LAWAFRICA

CITATION: [1995] LLR 384 (CAK)

Importance

The court for the first time considered whether the Married Women's Property Act would apply to Kenyan Muslims. The Q'uran has elaborate principles regarding property acquired during coverture. The court clarified that the Married Women's Property Act would apply as much to Muslims as to other Kenyans, hence implicitly rejecting the application of the principles of Islamic law.³⁰ The court also considered the remedies available for a spouse who is found to be entitled to some share in property then in the possession of the other spouse. The court rejected the possibility of ordering sale of the property forwarding mesne profits against the spouse in possession.

[1] Family Law - Property of spouses - Property acquired during the marriage Whether property must be treated as jointly owned between the parties Whether wife entitled to rent from jointly owned matrimonial home in occupation by husband and children - Whether wife contributed to husband's property.

Editor's Summary

The parties herein contracted an Islamic marriage in September 1972, which subsisted until November 1988 when it was dissolved. At the time of the marriage, the wife was employed in a tour company in Nairobi while the husband was running a family business. In 1973 the wife resigned from her job in Nairobi and joined the husband in running and managing his family business. In 1977 she and her husband set up a Boutique business that she run until the time of the break-up of the marriage. Two properties were purchased during the marriage, M-acre in 1977 and M-acre in 1985, the latter being held jointly and functioning as the matrimonial home of the parties.

In 1990 the wife applied by 'Chamber Summons', later amended to read 'Originating Summons', for declarations that the two properties were jointly owned and for the same to be sold and the net proceeds divided equally between

30 The principles that relate to ascertainment of property rights between spouses on divorce. Islamic marriages are generally governed by an ante-nuptial contract which prescribes the property rights of the parties.

the spouses. To ground her claim for a share in M-acre, the wife led evidence to show that she regularly gave substantial sums of money to her husband's company. She also produced the rent book, which named the husband and wife as landlords. The husband did not contest this evidence, save to assert that he had not claimed in some other property. The trial Judge did not make any order on M-acre and the wife appealed.

1. Where property is acquired during the subsistence of the marriage and registered in the joint names of the spouses, the law assumes that the property is held in equal shares. *Kivuitu v Kivuitu* [1982-1988] 2 KAR 241 followed. However, there is no presumption that any or all property acquired during the subsistence of the marriage must be treated as being owned jointly by the parties. Dictum of Lord Morris in *Pettit v Pettit* [1969] 2 All ER 385 adopted.
2. The mere fact of marriage does not give one spouse an interest in the property of the other spouse. By the Married Women's Property Act of 1882, the status of marriage was not meant to result in any co-ownership of property. The aim of section 17 of the Act is to determine questions of title to property, not to give the Judge discretion to pass property from one spouse to another based on their work, conduct or activities. *Pettit (supra)* adopted.
3. The Married Women's Property Act applies equally to Muslims as it does to non-Muslims in Kenya.
4. For the jointly registered property, the Court would order the husband to pay to the wife half its value but there was no merit in the claim for notional rent since the wife was aware that the husband and children of the marriage were occupying the property. For the property registered in the husband's name, the wife had made substantial contribution to its acquisition and she was also entitled to a half-share therein.

Appeal allowed in part.

Assessment

The court considered whether the Married Women's Property Act would be applicable to Kenyan Muslims. The court also adopted ratio from *Pettit* on the role of the Court in a section 17 application. However, the Court failed to sufficiently analyse and apply the principles enunciated in *Pettit* and clarified in *Gissing* for the distribution of matrimonial property. The court decided on an equality of division of the property held in the husband's name without stating the basis upon which that estimate had been made. The court did not analyse whether there was an intention by the husband for the wife to share in the property. Assuming that the Court was proceeding under the doctrine of resulting trust, the Court failed to set out or apply the principles through which a trust would be imputed. And the decision is totally quiet as to the property laws that obtain in Kenya and how these would be interfaced with the imputation of a trust. The court also failed to distinguish between legal and equitable ownership or to reconcile the ratio in *Pettit*

(against passing title between spouses) with the final decision to award the wife a 50% share in property registered in her husband's name.

Cases referred to in judgment

East Africa

Kivuitu v Kivuitu [1985] LLR 14 11 (CAK)

United Kingdom

Pettit v Pettit [1970] AC 777

Judgment

OMOLO JA: Once again the Court is called upon to adjudicate on the vexed question of how property which has been acquired during the subsistence of a valid marriage should be dealt with following the dissolution of the marriage. Until 14 November 1988 when this matter was dissolved, Fathiya Essa the appellant and Mohamed Alibhai Essa, respondent, were wife and husband respectively. They had contracted an Islamic marriage on 16 September 1972. At the time of her marriage, the appellant was employed in the capacity of a senior tours officer with the United Touring Company in Nairobi and she was then earning KShs 2 300. That must have been a considerable amount of money in 1972. By 1973, the appellant's salary had risen to KShs 2 500. The respondent, however, was based in Mombasa where he was engaged in their family business called Alibhai Essa and Company Limited. The appellant could not continue to work and stay in Nairobi while the respondent lived with his parents in Mombasa. So in 1973, the appellant resigned from her job in Nairobi and moved to Mombasa. Her evidence was that she was absorbed in the family company and started to work there for no pay. When cross-examined by Mr Asige on behalf of the appellant, the respondent contended that the appellant was being paid KShs 1 000 when she was working in the family business. The Learned Judge (Wambiliangah J) did not make a specific finding on this issue but as far as I am concerned it really does not matter. Even if the appellant was being paid KShs 1 000 as the respondent contended that only went to show that she could not, by any stretch of imagination, be called a simple unemployed housewife. The KShs 1 000 allegedly paid to her was clearly far below what she was able to command in the then job market.

Be that as it may, she worked in the family business until 1977 when she and her husband set up a partnership business called 'Dressence Boutique'. The respondent resigned from the business in 1988.

In June 1977 property known as title number subdivision 1678, section number I/MN was acquired for the sum of KShs 85 000; it was registered in the sole name of the respondent. In August 1982 property known as Mombasa/Block

XX/18 8 situated at the centre of Mombasa town was acquired and it was also registered in the sole name of the respondent. That property is a commercial one and as it turned out before us the main battle in this appeal was centred solely on this property. It was purchased for KShs 1 000 000 and it must be of considerable value as of now.

Again in July 1985 property known as parcel number 1680 section I/MN at Nyali was purchased for KShs 700 000. It as registered in the joint names of the appellant and the respondent, and it was their matrimonial home. It is currently occupied by the respondent and the children of the marriage if and when they happen to be with the respondent.

The marriage between the parties having been dissolved on 14 November 1988, on the 22 October 1990 the appellant took out what was originally called a 'Chamber Summons' stated to be under Order XXXVI, rules I and 12 and section 3A of the Civil Procedure Act; section 28 of the Matrimonial Causes Act Chapter 152; section 17 of the Married Women's Property Act of 1882 and all other enabling provisions of law. The appellant had sought various declarations in respect of the properties I have already listed. The chamber summons was supported by affidavit of the appellant with various annexures attached thereto. On the 17 December 1990, the respondent entered a conditional appearance, protesting that the procedure adopted was not proper and he reserved his right to raise that issue. But apparently by 30 November 1990 the appellant had amended her chamber summons to be an originating summons and thus deprived the respondent of any further ground for protest. The orders sought in the originating summons were:

1. A declaration that land parcel title number subdivision 1678 section number IMN Mombasa was owned by the appellant and the respondent jointly or such order as to the ownership thereof as may be just;
2. A declaration that land parcel title number Mombasa/Block XX/188 was owned by the appellant and the respondent jointly, or such order as to the ownership thereof as may be just;
3. An order that the above said parcels number 1678 section IMN Mombasa and Mombasa/Block XX1188 be sold and the net proceeds be divided equally between the appellant and the respondent or otherwise as may be just,
4. An order that land parcel number 1680 section IMN which is jointly owned by the appellant be divided equally between the appellant and the respondent or otherwise as may be just.
5. An order that the respondent do pay to the appellant KShs 10 000 with effect from November 1988, that sum being half of the market rent that the premises on plot number 1680 section IMN jointly owned by the parties would attract and which premises had been exclusively used by the respondent since November 1988 and such payments were to be computed upto and including the time when the property would be sold.

There was also a prayer that the respondent be ordered to pay the costs of the originating summons.

Since the decision of this Court in *Kivuitu v Kivuitu* [1985] LLR 1411 (CAK), the law with regard to the disposal of matrimonial property upon the dissolution of a marriage is fairly well settled. Where property acquired during the subsistence of a marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares. There is of course, no presumption and there could not have been any, that any or all property acquired during the subsistence of the marriage must be treated as being owned jointly by the parties. Lord Morris of Borth-Y-Gest put it thus in *Pettit v Pettit* [1969] 2 All ER 385:

“... one of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this, in my view, negatives any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to the title to property the question for the Court was ‘whose is this?’ and not ‘to whom shall this be given?’.

With respect I agree. So that when a woman gets married to a man who already has property registered in his sole name, the fact of marriage alone cannot by itself confer any rights over such property, to the woman. Nor would the act of marriage alone confer on, the man any property rights over that of which the woman is the registered owner at the time of the marriage. Section 17 is only applicable where one party to the marriage is asserting an alleged right of ownership over a particular property which claim is repudiated by the other spouse. The court then has to receive such evidence as the parties may be in a position to place before it, and on the basis of such evidence, decide on these issues of ownership. Put another way, section 17 does not say who is to own what or how much over a property acquired during the subsistence of a marriage. Once again I quote Lord Morris in the *Pettit* case (*supra*):

“There is no provision empowering a Judge on the summary adjudication of a question to act any differently. I do not find this in the words (in section 17) ‘as he thinks fit’. Those are, undoubtedly, words which give a judicial discretion. Ample reason for their presence in the section is found when it is remembered that the section is dealing with questions ‘as to the title to or possession of property’. There may be cases where discretion can properly be exercised in regard to possession and in regard to remedies. I cannot, however, interpret the words ‘as he thinks fit’ as endowing a Judge with the power to pass the property of one spouse over to the other or to do so on some vague basis that involves estimating or weighing the good or bad behaviour of the one and the other or assessing the deserts of the one or the other in light of their work, activities and conduct. If matrimonial troubles bring the spouses to the Courts, there are various statutory powers relating to property which can be exercised. But if in a ‘question’ between a husband and a wife as to the title to property recourse is had to the special

procedure made possible by section 17, decision must be reached by applying settled law to the facts as they may be established.”

Once again, I respectfully agree and for my part, I would hold that the Married Women’s Property Act of 1882 of the United Kingdom is an Act of general application and applies equally to Muslims as it does to non-Muslims in Kenya.

How do these principles apply in this appeal?

As regards the matrimonial home, that is plot number 1680 section IMN, the Learned Judge made the only order which was open to him on the material placed before him. The property was registered in the joint names of the parties and it was, agreed that it be valued. Two valuations in respect of that property were placed before the Judge. One valuation was for KShs 1.5 million and the other one was for KShs 3 million. The Learned Judge accepted this latter valuation and he was clearly right in doing so. Mr Asige for the appellant contended before us that as the valuation for KShs 3 million was done in February 1990 while the decision of the Judge was made in 1993, the Judge ought to have placed a higher valuation on the property. The simple answer to that must be that if the appellant thought that by 1993 the value of the property-must have increased, it was clearly her duty to bring an upto date valuation, before the Judge. Mr Asige did not really press this point to the end. Nor could there be any merit in the claim for rent over the matrimonial property. The appellant knew the property was being occupied by the husband and the children of the marriage and it would be clearly wrong to demand some notional rent from the husband and the children on the basis of their occupation. That portion of the appeal is equally without merit.

Again Mr Asige did not press his arguments over the property which the Learned Judge ordered to be registered in the joint names of the children of the marriage and the respondent. I do not think we are called upon to decide that issue and I shall say no more on it.

The real issue which was fought before us was over the commercial property namely Mombasa Block XX/188. That property was bought in 1982. It was registered in the sole name of the respondent and that being so the burden was upon the appellant to show, upon a balance of probabilities, that she made a contribution towards its purchase. The Learned Judge did not say anything about this property and he did not make any order on it. That is probably because before the parties came to court, they had tried to settle the matter and their advocates had drawn up a written agreement for their signature. That property was not mentioned in the agreement and when cross-examined over that issue the appellant had said that if the respondent had signed the agreement, she would have given up her claim to the commercial property. The respondent had, for reasons best known to him, refused to sign the agreement and that forced the appellant to come to court. When she did come to court, she revised her claim to the commercial property and I do not think her claim could be answered by saying that she had been prepared to forego it and she was not entitled to revive the claim. The

respondent himself had repudiated the agreement and he was not entitled to rely on it in court.

I have said the burden was on the appellant to show that she contributed towards the purchase of the property. The property was purchased for KShs 1 million. It was the appellant who filed in the tender forms, but more importantly, she produced various cheque stubs showing that she used to give to her husband's company various sums of money, which sums were really not minimal. Those cheques displayed from pages 297 to 302 of the record of appeal. Again, she produced a rent book for the property (page 303) and the book clearly showed that the landlords were the appellant and the respondent. The respondent did not really challenge these assertions by the appellant and in my view, the appellant proved as required by law that she had made substantial contribution towards the purchase of the commercial property. She could not accordingly be denied her claim to the property telling her she ought not to claim everything. If she had contributed towards the purchase of everything then she would be legally entitled to claim everything. Nor could her claim be defeated on the ground that the husband had not claimed anything from the business called 'Dressence'. There was not evidence brought before the Judge to show that 'Dressence' was as valuable as a commercial property within the centre of Mombasa town. The Learned Judge was clearly not right in refusing to make any order with regard to the commercial property and to that extent her appeal is clearly meritorious.

I would accordingly propose the following orders:

1. That this appeal be and is hereby allowed to the extent that the appellant is awarded half share in the commercial property, namely Mombasa/Block XX/188. I would modify the order of the Judge by deleting from his final order the reference to plot 1615 section 1MN and substitute therefore an order that plot Mombasa/Block/XX/188 be valued as at the date of the High Court judgment by the same valuer Maina Chege and Company who valued the matrimonial home, and half the valuation so made be paid. In cash to the appellant. I would also order that the entire amount due to the appellant for the matrimonial home and commercial property be paid to the appellant, without interest, within six months from the date of this judgment failing which execution for the same shall issue.
2. The appellant has succeeded only on one ground and in the event I would order that each party shall bear its costs of the appeal.

As Lakha JA agrees, these shall be the orders of the Court. It only remains for me to say that this judgment is delivered pursuant to rule 32(3) of the Courts Rules, Gachuhi JA having unfortunately passed away before the delivery of the same.

MUNGAI V MUNGAI [1997]

COURT OF APPEAL OF KENYA AT NAIROBI

KWACH, TUNOI, SHAH JJA

Date of Judgment: 6 March 1997

Case Number: 191/95

SOURCED BY: LAWAFRICA

CITATION [1995] LLR 405 (CAK)

Importance

In an age where persons wishing to set up private companies to enjoy the benefits of incorporation are often turning to their spouses in order to satisfy the minimum member requirements, the decision in this case was an important one. Would a family-run company be wound up on the breakdown of a marriage? Would a family court have power to reach into company affairs and order a specific disposition of shares?

[1] Company – Winding Up – Dispute between shareholders – Company owned jointly by husband and wife – Matrimonial proceedings pending – Winding is petition on the ground that husband has betrayed trust and mismanaged company – Whether abuse of process of court – Whether abuse of process of court – Whether petition would be struck out.

[2] Family law – Property of spouses – Company shares – Whether amendable to jurisdiction of section 17 Married Women' Property Act.

Editor's Summary

The appellant and respondent got married in 1972 and cohabited until 1995 when the wife filed for divorce alleging adultery and cruelty. In May 1980 during pendency of their marriage, the appellant and respondent set up a company, M, in which the husband held 399 shares and the wife held one share. Each share had a nominal value of KShs 100 each. The husband and wife were also the only directors, and they intended to run the company as a family enterprise providing financial support to their family. Although registered as a company, it appeared that the business was for all practical purposes run as a partnership and some of the provisions of the Companies Act disregarded. The husband was in sole control of the business and generally took decisions without calling meetings or seeking his wife's consent.

After the breakdown of the marriage the husband locked her out of company affairs, denied her access to the premises, property or accounts of the company, purported to remove her as a director and was alleging to be disposing company assets. The wife filed this winding up petition alleging gross failure to comply with the Companies Act and the company's articles, loss of confidence and complete breakdown in the relationship between the parties. The husband then applied to strike out the petition on the grounds that it disclosed no cause of action was an abuse of the process of the Court. He argued that the petition was brought to

pressurize the respondent in relation to the divorce petition. As the wife had already filed an application by originating summons to determine the rights of the parties to the matrimonial property, the petition, he argued, was brought merely for the purpose of embarrassing him.

The trial Judge agreed and struck out the winding up petition in *limine*. The wife then appealed, on the ground that the Judge erred in failing to distinguish between a winding up petition and an application to determine the wife's share in matrimonial property.

Held:

1. (Per Kwach and Shah JJA) the application under section 17 of the Married Women's Property Act of 1882, being a procedural section, merely declares the rights of married woman to properties jointly held by spouses or by the husband. It would not cover shares held by her own right. The 1882 Act cannot decide anything that a company court exercising its independent and separate jurisdiction under Companies Act (Chapter 486) can decide. The two jurisdictions are totally independent of each other.
2. A company would be wound up on just and equitable grounds where the exercise of legal rights is unjust to one party such as where a director treats the company as his own, even though the same is accomplished due to his overwhelming numerical superiority. *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, *Re Davis and Collet Ltd* [1935] Ch 693 and *Re Garnets Mining Co Ltd* [1978] KLR 224 adopted. The petition should not be struck out except on clear and persuasive grounds. *Bryanston Fiance Ltd v De Vries* (number 2) [1976] 1 All ER 25, *Brambhat v Dynamics Engineering Ltd* [1982-1988] 1 KAR 1033 and *Mann v Goldstein* [1968] 1 WLR 1091 adopted.

Per curiam: (per Kwach JA) The husband's mistake is to regard and treat the wife as his wife for all purposes, and to forget that as a shareholder, this frankenstein of his own creation has powers beyond the privileges of a mere wife (per Shah JA). The Companies Court will not make decisions as to property rights of the appellant and the Matrimonial Court cannot make decisions declaring the appellant's rights as a director/shareholder of a company.

Appeal allowed.

Assessment

This case involved a winding up petition filed concurrent to an application for determination of the wife's interest in certain property of the husband. The court concluded that the jurisdiction of a Companies Court is different from that of a Matrimonial Court, and the application was properly before the Court.

Surprisingly, this decision anticipates the turn of the tide towards giving effect to the legal property regime save upon the application of sound equity principles.

Naturally, the fact that the case was not a matrimonial cause but a winding -up cause aided in this change of emphasis.

Cases referred to in judgment

East Africa

Adar and others v Attorney General Civil Appeal number 14 of 1994 (UR)

Re Garnets Mining Co Ltd [1978] KLR 224

United Kingdom

Bryanston Finance Ltd v De Vri'es (number 2) [1976] 1 All ER

Ebrahimi v Westborne Galleries Ltd [1973] AC 360

Mann v Goldstein [1968] 1 WLR 1091

Re Davis and Collet Ltd [1935] Ch 693

Re Straw Products Pty Ltd [1942] All ER 222

Thomas v Drysdale [1925] SC 316

Judgment

KWACH JA: Lilian Njeri Mungai (the appellant) is the wife of Dr Njoroge Mungai (the respondent). The couple got married in May 1972, and have a son and three daughters, aged between 32 and 19 years.

In February 1995 or thereabout, the appellant filed a petition for divorce alleging adultery and cruelty against the respondent, and named as co-respondents four women with whom she alleged the respondent had committed adultery. The petition for divorce is still pending.

The appellant has also filed an originating summons under section 17 of the Married Women's Property Act, 1882, for the determination of title to certain properties held by the respondent. That suit is also still pending. She has also filed two petitions seeking, in each case, an order for the winding up of two companies Magana Holdings Ltd and Muni Ltd. In Muni Ltd the appellant holds one single share while the respondent holds 399 shares. Muni Ltd is said to be the majority shareholder in Magana Ltd. In her petition for the winding up of Muni Ltd, the appellant alleges among other things, that the company has not held a general meeting of its members since its incorporation; that the respondent has unjustifiably and unlawfully excluded her from the day to day management of the company; that the respondent is running the company single-handedly; that the respondent has purported to hold meetings without notice to the appellant; that the respondent has denied her access to the registered offices of the company; that the respondent has denied her the use of company motor vehicles; that she has not been paid any remuneration; that the respondent has opened and operated bank accounts in the name of the company without consulting her; that the respondent has

misappropriated funds belonging to the company; and that the respondent has unilaterally without calling a meeting of the members removed the appellant as a director of the company.

The respondent did not file any affidavit in opposition to the petition but instead applied by chamber summons to strike out the petition on the ground that it disclosed no cause of action and was an abuse of the process of the Court. The supporting affidavit was sworn, not by the respondent, but by his advocate, Mr. Keith Howard Osmond. In paragraph 2 of his supporting affidavit, Mr Osmond deponed:

- “(3) that these Winding Up Petitions are an abuse of the process of the Court and disclose no cause of action and are brought solely to embarrass my said client Dr Njoroge Mungai and to bring illegal pressure upon him in the 3 matrimonial suits set out herein above.”

The application was heard by Ole Keiwua J who found in favour of the respondent and struck out the two petitions and it is against that order that the appellant has appealed to this Court.

There are all together 7 grounds of appeal, but the essence of the appellant's complain as adumbrated before us by Mr Oraro, for the appellant, is that the Judge confused two separate and distinct jurisdictions of the superior court – companies and matrimonial causes, and failed to appreciate the distinction between the parties as individuals (wife and husband) on the one hand, and as shareholders in a limited liability company with a corporate personality, on the other. As the application was brought on the basis that the petition did not disclose a cause of action and was otherwise an abuse of the process of the Court, all I have to consider to see if the Judge was right or wrong is to look at the grounds set out in the petition itself. I have already alluded to some of these. The appellant's case was that the company was being run in a manner oppressive to her and in contravention of statutory obligations. These allegations have never been controverted as the respondent did not file an affidavit in reply as required by rule 31(1) of the Companies (Winding Up) Rules. Yet the Judge in his ruling held that they disclosed no cause of action. He said:

“I accept the respondent's submission that the petitions show no cause of action and are an abuse of the process of the Court. In view of the existence of an application under section 17 of the Married Women's Property Act to declare the petitioner's rights to property, these petitions may be viewed as brought to embarrass and pressurize the respondents. Although I have not seen that application, maybe one of the orders would include declarations as to the extent of the petitioner's rights in the companies in view of her statement in paragraph 6 of the petition she assisted in the raising of the monies used to buy these companies.”

The Judge confessed that he had not seen the originating summons but ventured to speculate as to the nature of the remedies the appellant might have sought. The

application under section 17 of the Married Women's Property Act 1882 could only deal with property held by the respondent as a husband. It would not cover shares held by the respondent in a limited liability company in which the wife also held shares in her own right. The Judge does not say why he thinks the petition did not disclose any cause of action. If all those allegations did not constitute a cause of action I do not know what does. The allegations on which the appellant sought a winding up order are very serious and if proved at the hearing of the petition would entitle her to the order. I can detect no element of frivolity in any of them so as to justify any suggestion that the appellant was prompted by anything other than a genuine concern about the manner in which the respondent is running the company.

Mr Le Pelly, for the respondent, did not dispute the veracity of the allegations made by the appellant in her petition but his submission was that since the appellant is a minority shareholder, and these violations had been going on for years, it is too late in the day for the appellant to complain now. That is obviously a logical deduction but certainly no answer in law to the appellant's petition. The grounds for winding up a company by the Court are set out in *Halsbury's Law of England*, (4 ed), Volume 7, paragraph 996:

“996. Grounds for Winding Up

A Company may be wound up by the Court:

- (1) ...
- (2) If default is made in delivering the statutory report to the registrar or in holding the statutory meeting;
- (3) If the number of members is reduced in the case of a private company, below two, or, in the case of any other company, below seven;
- (4) If the Court is of the opinion that it is just and equitable that the company should be wound up.”

The law recognizes that a limited liability company is more than, a mere judicial entity with a personality in law of its own; behind it there are individuals with rights, expectations and obligations between themselves. Just and equitable ground enables the Court to subject the exercise of legal rights to equitable consideration, namely, considerations of a personal character arising between one individual and another which may render it unjust or inequitable to insist on legal rights or to exercise them in a particular way. See *Ebrahimi v Westborne Galleries Ltd* [1973] AC 360 at page 379. A company may be wound up on just and equitable ground where, in the case of a private company, one director treats its business as his own and does not carry on the business as that of the company – in *Re Davis and Collet Ltd* [1935] Ch 693. In *Re Garnets Mining Co Ltd* [1978] KLR 224, Kneller J (as he then was) sounded a warning to majority shareholders who use their numerical

superiority to trample upon the unfortunate minority. In his judgment at page 236E he said:

“A shareholder too, (even one with 1501 shares to the other’s forlorn one), must avoid any conduct which would reasonably lead to the inference that he fails to appreciate the fact that it is his duty to use his voting power in the interests of the company as a whole, and that he must not ignore the interest of the other shareholder or treat the company and its assets as if they were his own private property. Furthermore, he must avoid acting in such a way a might reasonably be held to make it impossible for the other shareholder to cooperate with him in the management of the company.”

Mr Le Pelley’s other submission was that the appellant’s only cause of action lay in pursuing a remedy under section 211 of the Companies Act but he did not press this argument when it was pointed out to him that the relief under that section is only an alternative remedy.

I think the mistake the respondent has made is to regard and treat the appellant as his wife for all purposes, and to forget that as a shareholder, this frankenstein of his own creation, has powers beyond the privileges of a mere wife. I am satisfied that the petition disclosed a good cause of action and with no stretch of the imagination could be said to be an abuse of the process of the Court. The Judge was plainly wrong in deciding otherwise.

I would allow this appeal, set aside the ruling and order of the Learned Judge and substitute therefore the orders proposed by Shah JA

As Tunoi and Shah JJA also agree it is so ordered.

SHAH JA: The appellant, Mrs Lilian Njeri Mungai, filed in the High Court of Kenya, a petition to wind up a company known as Muni Limited (the company). The petition was filed in February, 1995. The grounds upon which the appellant sought winding up or the company are:

- (a) The company had not held a general meeting of its members since the appellant became a shareholder and director.
- (b) The company had not held its meeting of the Board of Directors since the appellant became a director.
- (c) The respondent (Dr Njoroge Mungai) has unjustifiably and unlawfully excluded the appellant from the day-to-day management of the company or participation in the same. In particular she was kept in the dark relating to company affairs namely:
 - (i) No meeting of the Board of general meeting had been called to transact the company affairs.
 - (ii) The respondent was running the company single handedly.
 - (iii) The respondent was personally running all company accounts.

- (iv) The respondent purported to hold meetings without notice to the appellant.
- (v) No accounts of the company had been published and if any had been made public then the same was done without the sanction of the Board or its members.
- (vi) The respondent had dealt with the investments and the property of the company without sanction of the Board or its members.
- (vii) The respondent had filed returns without notice or sanction of the Board or its members.
- (d) The appellant was not allowed access to the registered office of the company on LR number 209/3888, Windsor House Nairobi.
- (e) The respondent had embarked on a systematic design of disposal of the company assets in an attempt to deprive the appellant of her rightful share in the equity of the company to which end the respondent had.
 - (i) Denied the appellant access to the company's premises.
 - (ii) Knowing that he appellant has rendered services to the company and for the benefit of the company had denied any emoluments as director of the company.
 - (iii) Denied use of the company vehicles to the appellant.
 - (iv) Withdrawn corporate credit cards/benefits thus rendering the appellant destitute.
 - (v) Refused to divulge anything concerning the company to the appellant.
 - (vi) Not paid dividend or director's remuneration to the appellant.
 - (vii) Opened up bank accounts without consultation.
 - (viii) Interfered with bank accounts.
- (f) The respondent had unilaterally without the meeting of the members purported to move the appellant as Director contrary to the requirements of the company's articles of association.
- (g) The respondent had used over the years funds belonging to company for his personal affairs and for personal gain without any authorization from the company members and directors as required by the company's articles of association and the Companies Act.
- (h) The appellant was not successful in getting to rectify the running of the affairs of the company in accordance with the articles of association or according to law as the respondent has refused to meet or discuss anything about the company with

the appellant or her representative with a view to resolve the matter as complained above.

- (i) The appellant had lost confidence and probity in the respondent in the affairs of the company.
- (j) There is no chance of salvaging relationships between the appellant and the respondent on account of total breakdown of marriage between parties.

The respondent applied by Chamber Summons to strike out the petition on the grounds that the petition disclosed no cause of action and was an abuse of the process of the Court. In support of that application the respondent's advocates relied upon the affidavit of Keith Howard Osmond (the respondent's advocate in High Court Divorce causes numbers 14 and 16 of 1995 and in High Court civil case number 873 of 1995 (OS) being an originating summons taken out under Married Women's Property Act of 1882 or England) to say that the winding up petition was an abuse of the process of court, disclosed no cause of action and was brought solely to embarrass the respondent and to bring illegal pressure upon him concerning the three matrimonial suits afore-mentioned. It must be borne in mind that the Learned Judge did not have, before him, at the time of the hearing of the striking out application, the file of the Married Women's Property Act claim by an OS. The Learned Judge proceeded to strike out the winding up petition in terms of the chamber summons application to strike out the petition.

The Learned Judge held that the petition did not show any cause of action and was an abuse of the process of court. He concluded that in view of the existence of an application under section 17 of the Married Women's Property Act which had sought to declare the appellant's right to property, the winding up petition may be viewed as brought to embarrass and pressurize the respondent.

It would in my view be wrong to infer, merely because section 17 application under the Married Women's Property Act of 1882 was pending between the parties who are co-shareholders in a company, that the winding-up was an abuse of the process of court. The law gives rights to seek such remedies as the parties may be entitled to. If different Acts of Parliament give rights to parties to ventilate their grievances in court, then the law must be allowed to take its course, subject of course to the Court being able to say that the defendant/respondent ought not to be vexed again in a matter pending earlier in another court. In the instant cause there was no evidence before the Learned Judge that the issue of the appellant's entitlement under the Act of 1882 was in any manner intertwined with the issue of winding up of the company. The 1882 Act remedies are of a special nature. Section 17 of the 1882 Act being a procedural section merely declares the rights of a married woman to properties jointly held by spouses or by the husband. That Act cannot decide anything that a company court exercising its independent and separate jurisdiction under the Companies Act (Chapter 486) can decide. The two jurisdictions are totally independent of each other.

There was no evidence before the Learned Judge to conclude that the petition to wind up the company was an abuse of the process of court. On the contrary there was evidence before the Learned Judge to show that the relationship between the two shareholders of the company had reached a point of no return. This is indicative of a situation where it may be just equitable to wind up such a company.

Striking out a winding up petition in limine is obviously a drastic remedy and in my view the Learned Judge did not apply the correct test for such a remedy.

Buckley LJ in the case *Bryanston Finance Ltd v De Vries* (number 2) [1976] 1 All ER 25 says at page 36C:

“It has been long recognized that the jurisdiction of the Court to stay an action *in limine* as an abuse of process is a jurisdiction to be exercised with great circumspection, and exactly the same considerations must apply to a *Quia Timet* injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the Court for a winding up order in appropriate circumstances is a right conferred by statute. A would be petitioner should not be restrained from exercising it except on clear and persuasive grounds. I recognize that the presentation of a petition may do great damage to a company's business reputation, though I think that the potential damage in the present case may have been rather exaggerated.”

The above passage was referred to with approval in the case of *Brambhat v Dyanics Engineering Ltd.* [1982-1988] 1 KAR 1033 (see page 1007). I would go to the extent of agreeing with what Ungeed Thomas J said in the case *Mann v Goldstein* [1968] 1 WLR 1091, at page 1095 F:

“I come now to the allegation of lack of *bona fides* and to abuse of process. It seems to me that to pursue a substantial claim, in accordance with the procedure provided in the normal manner, even though with personal hostility of even venom, and from some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the Court or acting *mala fide* but acting *mala fide* in accordance with the process.”

What the above passage sets out is clear. There will be some hostility, acrimony or venom in presenting a petition for winding up. The situation can only arise if somewhere along the line the directors and/or shareholders have fallen out.

What the Court ought to consider, amongst other matters, in an application for striking out a winding up petition, is whether the petition is brought on grounds which fall under section 219 of the Companies Act and once the petition could fall within the ambit of this section the Court ought not to summarily reject the petition but the Court ought to allow the contestants to put forward their respective cases on merits and then decide if it would be just and equitable to wind up the company. In other words once a petition for winding-up shows that the petitioner is able *prima facie* to bring himself/herself within one of the enabling sub-sections of section 219 of the Companies Act, the Court ought to hear the petition

on merits after the respondent has filed replying or opposing affidavit(s) under Rule 31(1) of the Companies (winding up) Rules made under the Companies Act. The period of seven day is however subject to extension per provision in Rule 201 of the Rules.

I would not hesitate to state that if the state of affairs of the company as deponed to by the appellant does exist there is a clear case crying out aloud to be heard rather than being made short-shrift of *in limine*.

Taking a hypothetical case, for instance, if a winding up petition is filled to coerce the company to pay a disputed debt, the petition could well be struck as a company court is not a debt collecting agency.

The parties or rather the contestants here have clearly fallen out. It is alleged that the appellant has been wrongfully deprived of her directorship in the company. It is alleged, otherwise, that she is no more a director. Whether she ceased to be a director or not will be a matter for the company court to decide and not the matrimonial or civil court.

To enable the Companies Court to make the winding-up order sought, not only the appellant ought to show that she is entitled to present the petition but she must bring herself within the ambit (in this particular case) of section 219(b) and section 219(f) of the Companies Act and if what the appellant says is true there is jurisdiction in the Companies Court to order winding-up of the company.

The fact that the appellant holds one share only of 400 shares of the company does not per se disentitle the appellant to bring up winding-up proceedings. Mr Le Pelley for the respondent attempted to put forward such and argument which in my view does not stand scrutiny. In the case of *Re Garnets Mining Company Limited* [1978] KLR 224 Kneller J (as he then was) said at 236D:

“A shareholder, too (even one with 1501 shares to the other’s forlorn one), must avoid any conduct which would reasonably lead to the inference that he fails to appreciate the fact that it is his duty to use his voting power in the interests of the company as whole, and that he must not ignore the interests of the other shareholder or treat the company and its assets as if they were his own private property. Furthermore, he must avoid acting in such a way as might reasonably be held to make it impossible for other shareholders to co-operate with him in the management of the company: per Lord Skerrington in *Thomas v Drysdale* [1925] SC 316: Gavan Duffy J in *Re Straw Products Pty Ltd* [1942] All ER 22, 226.”

From what I have said so far I do not have to numerically get into the grounds of appeal argued by Mr Oraro. As matter stood before the Learned Judge there was clearly a cause of action and there was no abuse of the process of court. There is no doubt that the company was started as a family (husband and wife) business by both the contestants before us. It is not a case where the husband brought in, much later after incorporation, into the company, the wife with one share to her credit. The

wife's rights under section 17 of the Married Women's Property Act of 1882 are separate and distinct from her rights as a shareholder/director of a company.

Mr Le Pelley argued that the appellant could have invoked the provisions of section 211 of the Companies Act. That is to say she would have filed a petition for relief for alleged oppressive conduct under section 211(1) of the Companies Act. This issue was not raised in the superior court but it is clear to my mind that to complain that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) make an application to the Court. That in my view would not be a course which the appellant would want to pursue. But the choice is hers.

Most of Mr Le Pelley's arguments went towards defending the petition on merits rather than striking out of the petition in limine. Whether Mr Sharma and Miss Shah are the real shareholders or not will remain a matter of evidence at the hearing. Whether or not the appellant acquiesced in the manner she says the company is being run would again be a matter for the Companies Court at proper hearing of the winding-up petition. Whether or not the actions of the appellant amount to those of a person not genuinely interested in the affairs of the company (if indeed such is the case and if indeed the appellant is such a person) would again be a matter of evidence.

The issue of *locus standi* raised by Mr Le Pelley, relying upon the case of *Adar and others v Attorney General* (Miscellaneous Civil application number 14 of 1994) an unreported decision of a Judge constitutional court, is not relevant here. A shareholder can apply for winding-up a company if he/she can bring himself/herself within the ambit of section 219 of the Companies Act. A director who may have been wrongfully removed has the right to go to the Companies court. That decision is irrelevant for the purposes of this appeal. The Companies Court will not make decisions (and cannot do so) as to property rights of the appellant and the Matrimonial Court cannot make decisions declaring the appellant's rights as a director/shareholder of a company. Even if there may be some overlap eventually that can be no ground for saying that section 17 (of the Married Women's Property Act of 1882) application overtakes the winding-up petition.

For all the reasons that I have gone into I would allow the appeal, set aside the Learned Judge's order striking out the two petitions, which I would reinstate and would also order that the petition do proceed to hearing subject to the rules made under the Companies Act being complied with. I would order that the appellant do have costs of this appeal and cost of the chamber summon application in the superior court to be paid by the respondent and not the company.

TUNOI JA: It is in dispute and it is indeed common ground that the appellant and the respondent, who are husband and wife respectively, do not meet on matters of the companies of Magana Holdings Limited and Muni Limited in which both

parties have significant interests. This is due to their grave differences in marriage, which have culminated in the institution of three matrimonial suits.

It is alleged in the petition for the winding up, *inter alia* that the company has not held a general meeting nor its meeting of the board of directors since incorporation on 29 May 1980 and that the respondent has excluded the appellant from the management of the company or participation in the same. It is further averred that the respondent has embarked on systematic design of disposal of company assets in an attempt to deprive the appellant of her rightful share in the equity of the company.

The company is a private, with a nominal capital of KShs 40 000 divided into 400 shares of KShs 100 each, the appellant was allocated one (1) share, the respondent, the petitioner's husband, 399 shares. The two were the only directors. The intention of the directors was to run the company as a family enterprise providing financial support to their family. Although registered as a limited liability company, it appears that the same has for all practical purposes been run as a partnership. When the marriage between the directors went on the rocks it became impossible to jointly run the company.

Under these circumstances it was contended by the appellant that a complete deadlock had arisen and that it was meet and just that the company ought to be wound up. The Learned Judge Ole Keiwua J held:

"I have carefully examined each and every submission made for and against the petitions by the petitioner and the respondent. I accept the respondent submission that the petitions show no cause of action and are an abuse of the process of the Court. In view of the existence of an application under section 17 of the Married Women Property Act to declare the petitioner's rights to property, these petitions may be viewed as brought to embarrass and pressurise the respondents. One of the companies to be wound up is joined in that application. Although I have not seen that application, may be one of the orders would include declarations as to the extent of the petitioner's rights in the companies in view of her statement in paragraph 6 of the petitions that she assisted in the raising of the monies used to buy these companies. I therefore strike out both petitions."

From that ruling the appellant has preferred this appeal contending in the main that the Learned Judge erred in holding that the petition, as filed, showed no cause of action and was an abuse of the process of the Court.

Though there is no reply by the respondent to the petition, it is plainly clear that the petition contained very grave allegations against him and in the circumstances the petition ought to have been heard so that the parties could not be said on the facts stated in the support of the petition that this was a plain and obvious case suitable for striking out the winding up petition especially when the respondent had not disclosed the nature of his defence to the Court.

The application before the Learned Judge required lengthy argument by counsel on complex issues of interpretation of sections of the Companies Act and the matter was not therefore a suitable case for summary proceedings. Moreover, the ruling so given did not practically determine all the issues between the parties nor of the action in one way or the other.

A winding up petition and indeed all other proceedings under the Companies Act are serious matters and must be carefully thought out before institution by any party. The Court, likewise, must not act capriciously or in a wanton manner in dealing with such proceedings and ought not to strike them out summarily unless they appear so hopeless that they plainly and obviously disclose no reasonable cause of action.

For all the foregoing reasons, I would allow the appeal and would make orders as proposed by Shah JA.

KIMANI v KIMANI [1997]

COURT OF APPEAL OF KENYA AT NAIROBI

GICHERU, OMOLO AND LAKHA JJA

Date of Judgment: 21 November 1997

Case Number: 79/97

SOURCED BY: LAWAFRICA

CITATION: [1997] LLR 553 (CAK)

Importance

Kimani v Kimani is an important decision on the law of property between spouses, even though the principles adumbrated therein began their existence in the overruled High Court judgment of Kuloba J and the minority Court of Appeal decision of Gicheru J. The majority opinion of the Court of Appeal did not directly deal with the principles, it avoided the property law question after determining that Kuloba J had exhibited patent bias against the female gender by his characterisation of the contemporary wife.

The essence of the now-prevailing opinion is that contribution must be proved by cogent evidence and no general presumptions would be made to allow one spouse to law claim in equity to property in which the other spouse is the legal owner.

[1] Family law – Property of spouses – Property owned by husband – Acquire during trouble marriage – Whether spouses pooled their resources together – Conflicting evidence – Whether there was evidence of contribution – Whether trust would be implied.

[2] Judicial Review – Bias – The test against bias – Trial Judge exhibited bias against the female gender – Application for determination of matrimonial property – Whether court would delve into the substantial issues of the case.

Editor's Summary

The parties in this dispute underwent a Christian marriage in February 1979, which marriage was blessed with two children. Between September 1981 and September 1986 the parties lived apart due to strains in their relationship. In February 1995, after intermittent separations, the wife left the matrimonial home with the children for good, allegedly after a severe beating from the husband that resulted in her hospitalisation. She filed a maintenance and separation cause in a subordinate court. The suit was dismissed but the parties then filed for divorce, which application was pending. The wife then brought this application asking for a share in various properties: land, vehicle, household goods and shares in a company jointly owned by her husband and a stepson.

During the hearing, the evidence of the parties differed in some material particular. The trial Judge preferred the husband's evidence that the spouses had not organised their financial affairs jointly. The wife's vague testimony contrasted to the husband's clear explanations, coupled with the disharmony of the spouses and the great disparity in their levels of income led the Judge to conclude that the wife had made no contribution to the husband's property. The wife had already taken from the matrimonial home what she considered her property under a court order. The trial Judge held that contribution must be proved on evidence, that there is no presumption that every wife is an automatic asset, and each wife must be considered on the basis of her individual worth.

Further, the trial Judge held:

- (i) The principle of separate property means that one spouse does not acquire an interest in the other's property by virtue of marriage alone. Even for property acquired during marriage by purchase of gift, it remains the property of that spouse unless he or she makes a disposition of it in favour of the other spouse, or unless a court order gives an interest to the other spouse on or after a decree of divorce, nullity or judicial separation. Marriage does not directly change the ownership of property even though it may affect its enjoyment. In law, there is no such thing as "family property" or "matrimonial property".
- (ii) Where a spouse claims ownership or a beneficial interest in property registered in the name of the other spouse, the Court requires cogent evidence to enable it to discover the right and interest claimed. Conclusion must depend upon an analysis of particular facts and detailed evidence, and of course, a proper application of recognised legal principles. Where the evidence is meagre and there is a *prima facie* right in the defending spouse, the Court will not disrupt the existing rights and re-allocate or share them out.
- (iii) On considering the evidence and various principles, the wife had not made any substantial contribution that enabled the husband to be relieved from family responsibilities so as to buy any of the property claimed. There was no evidence adduced to imply a trust.

On appeal, the wife contended that the trial Judge's *obiter* remarks exhibited a biased attitude towards women in general, and that justice was therefore not done.

Held: (Per Lakha and Omolo JJA; Gicheru JA dissenting) to determine whether the Judge took into account extraneous consideration, the Court would consider whether there is an appearance or real likelihood of bias. If a reasonable person would be likely to conclude that the Judge favoured one side, then the test would be satisfied, and it would not be necessary to delve into the question of whether he was fact biased. *R v Liverpool City Justices, ex parte. Topping* [1983] 1 All ER 490, *Metropolitan Properties Co. (FGC) Ltd v Lannon* [1968] 3 All ER 304 adopted.

Dissent of Gicheru JA: While the trial Judge took an off-course on women bordering on bias against the female gender and made unsolicited guidelines on law

of property between spouses, he nevertheless observed that contribution had to be proved in evidence by the claiming spouse unless it was admitted. However, on the material before him, any decision in favour of the wife would have been mere conjecture about how the parties might have ordered their affairs or would have been ascribing to them intentions that they never had. *Gissing v Gissing* [1970] 2 All ER 780 adopted.

Appeal allowed. Case remitted to different Judge on the High Court for rehearing

Assessment

Kuloba J's judgment in the High Court was overruled for manifesting an unwarranted bias against the female gender. The judgment eloquently analysed the cultural transformations in inter-spousal relations but the Judge's rather non-judicial pronouncements on the character of women were uncalled for. Still his 51 page judgment worked a metastasis in the local jurisprudence on family law.

Gicheru J, who reviewed the evidence while dismissing the trial Judge's 'unsolicited guidelines' on distribution of property between spouses, ended up in agreement with his conclusions. And while Gicheru J's judgment was the minority in this case, it was subsequently adopted in *Kamore v Kamore* and has now become the *nom de guerre*.

In effect, the Court was now becoming conservative and would not presume contribution by the wife to the husband's property merely on this basis of her fulfilling the duties of a wife and mother. Contribution would have to be proved by the claiming spouse unless it was admitted. In this case, there was evidence that the parties had not organised their financial affairs jointly. Gicheru J adopted the dicta in *Gissing* to effect that the Court should not ascribe to the parties intentions that they never had.

One can now see that the Court would treat differently a situation where a spouse was claiming interest in a property acquired by the other spouse from his independent efforts and one in which the property, even though registered in the sole name of one spouse, was acquired partly or wholly from the efforts of the other spouse.

The contribution of the minority Judgement is mainly in the insistence that for the Court to disrupt or interfere with existing property rights between the parties, sufficient evidence to impute a constructive trust in favour of the claiming spouse must be adduced. The court also dispelled the shadows of 'family property' that had made their home in our jurisprudence.

Cases referred to in Judgment

United Kingdom

Gissing v Gissing [1971] AC 886

Metropolitan Properties Co. (FGC) Ltd v Lannon [1968] 3 All ER 304

R v Liverpool City Justices, ex parte Topping [1983] 1 All ER 490

Judgment

LAKHA JA: The facts and background leading to this appeal are fully and stated in the judgment of my brother Gicheru JA which I have had the advantage of reading in draft. They need not be restated and I gratefully adopt the same for the purposes of this judgment.

There is, however, one matter in respect of which I would add a few words of my own. The Learned Judge of Appeal having said that the judgment of the trial Judge was unnecessarily long observed, *inter alia*.

“In his 51 typed pages judgment dated and delivered on 14 November 1996, the Learned trial Judge after setting out the case before him took an off-course on woman bordering on bias against the female gender and purported to give unsolicited guidelines on the law of property where spouses or former spouses lay claim on property used by them in the family..”

Upon a careful consideration of the judgment of the trial Judge, I find, with respect, that he took into account extraneous considerations and exhibited a biased attitude against women in general. Counsel for the appellant made this a criticism of the Learned trial Judge’s judgment, in my view, rightly so. Indeed, it was specified as an express ground of appeal and heavily relied upon.

It is therefore possible to proceed straight away to the way argument is put on behalf of the appellants. This has, in my view, much substance. It depends on the general rule, which can be described as a common law rule, as to justice being seen to be done. There are a considerable number of authorities now on this subject. They are conveniently collected in *R v Liverpool City Justices, ex parte Topping* [1983] 1 All ER 490 and 494. In that judgment Ackner LJ refers to the very well known case of *Metropolitan Properties Co. (FGC) Ltd v Lannon* [1968] 3 All ER 304 at 310 where Lord Denning MR sets out a test, when he said as follows:

“... In considering whether there was real likelihood if bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.

There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The Judge was biased".

In my view, therefore, the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias. For the purposes of this appeal that test is, come to the conclusion, that appellant has established that the reasonable and air minded person sitting in the Court and knowing all the facts would have reasonable suspicion that this appellant did not have a fair hearing of her case and that a fair hearing was not possible.

It follows that I would allow this appeal with costs, set aside the judgment of the superior court and remit the case to another Judge in the superior court. Let it be heard again as soon as may be.

GICHERU JA: The appellant and the respondent each hold a Bachelor of Education degree from the University of Nairobi obtained in October 1978. On 3 February 1979, they got married. At the time of marriage, the appellant was a graduate teacher earning a gross monthly salary of KShs 1 995 while the respondent was working with American Embassy in Nairobi earning a monthly salary of about KShs 4 500. During the substance of their marriage, they both realized that they had no property and according to the parent the first decision they made towards this end was to buy shares land at Gatarakwa Settlement Scheme. They were then both living in Nairobi and as the appellant was then nursing their first born child, the respondent did the travelling between Nairobi and Gatarakwa for the purpose of buying the shares aforementioned. These shares were bought over a long period of time – between 1979 and 1983 – and according to the appellant, she intermittently gave the respondent monies from her monthly earnings for this purpose up to about the year 1982. In between this, she at times paid house rent for the house in which they were living in Nairobi besides buying food for the family and paying salary for the house maid which was KShs 140 per month. She also at times paid water and electricity bills although many times these bills were paid by the respondent. Eventually the Gatarakwa piece of land was registered in the name of the respondent as Gatarakwa/Gatarakwa Block IV/149.

After the purchase of the Gatarakwa piece of land, the respondent subsequently acquired a plot at Athi River which was registered as LR number 337/458 respect of which the appellant claimed to have given respondent money from her salary although she did not know the cost of that plot.

Sometime in 1985, the appellant took a loan of KShs 30 000 from Mwalimu Co-operative Society Limited. According to her, she gave this money to the respondent in the form of a banker's cheque in his name. He went abroad and

came back with two motor vehicles a Datsun car and Peugeot 504 car which later he sold and used the proceeds of that sale as a deposit for the purchase of their matrimonial home, house number 82/447 at Greenfield Estate, Phase 1, Nairobi, while he gave the Datsun car to the appellant for her use. The deposit towards the purchase of the matrimonial home was KShs 120 000 and the house constituting the matrimonial home was registered in the name of the respondent. The appellant and the respondent occupied that house as their matrimonial home from the year 1986 until 17 February 1995 when the appellant left the home on hospitalization at the Aga Khan Hospital, Nairobi after a brutal beating, according to her. By the respondent in 1983 and 1992 she contributed in money and personal effort in the respective establishment of two auto spares and hardware businesses in Eastleigh, Nairobi and in Nyeri Township both of which were in the name of Beki Auto Spares and Hardware. The appellant could not, however, recollect her specific monetary contribution towards the establishment of these two businesses.

In 1990 when the respondent wanted to extend the matrimonial home at Greenfield Estate in Nairobi, the appellant, according to her, took a loan of KShs 30 000 again from Mwalimu Co-operative Society and gave the money to the respondent in the form of a bankers cheque for this purpose.

Other than the properties referred to above, during the subsistence of the appellant's marriage to the respondent, they had, according to the appellant, bought land known as Kajiado/Olchoro-Onyore/2201; unsurveyed plot number 346 at Kariobangi Light Industrial area and unidentified parcel of land at Lang'ata near the Kenya Broadcasting Corporation (KBC) transmission Station. They had also purchased movable properties, namely; motor vehicles registration numbers KAE 682E, Mercedes Benz and KAC 495V, Toyota Hilux Pick-up; two sofa sets, four beds and four mattresses; a television set, national; a Sony video recorder; and a National Video recorder. In the purchase of all these properties, the appellant claimed to have contributed in form of money and in particular as the wife of the respondent she financially contributed towards the welfare of the family by buying food, clothing and other expenses which the respondent would otherwise have had to bear alone. In addition to her teacher's salary and loans from her Co-operative Society, the appellant claimed that her other source of income was in marking examinations from where she made between KShs 5 000 and KShs 6 000 each year. Intermittently, she gave the respondent money as and when he asked for it and in various sums keeping no record of the same as she never anticipated the problem that had now arisen over the properties purchased by the respondent towards which she had made monetary and/or personal contributions towards their acquisition. She understood that everything that was being acquired by the respondent was theirs despite their strained relationship between the years 1981 and 1986 when they were not living together although they consulted as husband and wife and planned together during this period notwithstanding her living at Tumutumu with the children of marriage where she was a secondary school teacher while the respondent was living in Nairobi.

During her marriage to the respondent, the appellant claimed to have obtained four loans from Mwalimu Co-operative Society the first three of which were for KShs 30 000 each while the fourth one was for KShs 125 000 which she used for buying her personal motor vehicle, a Renault 16TL registration number KRS 240, after the respondent took away from her and sold the Datsun motor vehicle referred to earlier in this judgment. The implication in this regard is that the first three loans of KShs 30 000 each were used towards the acquisition of the properties the subject matter of her originating summons in the superior court taken out under section 17 of the English Married Women Property Act of 1882 and filed in that court on 24 May 1995. It was on account of her direct and indirect contributions towards the acquisition of these properties that the appellant sought one-half share of it all.

That respondent admitted having been married to the appellant on 3 February 1979 shortly after the two graduated from the University of Nairobi and that both had lived together as husband and wife until 1995 when they separated. Currently there are divorce proceedings pending in the superior court instituted by the respondent in that court's Divorce Cause number 36 of 1995 and the appellant has cross-petitioned for divorce in the same case. According to the respondent, before his marriage to the appellant, he owned property since before joining the University of Nairobi he had been a military officer for a period of 2 years and prior to that, he had been a primary school teacher for 1½ years having been trained as a P1 teacher. Indeed, he owned not only household property but also cows and sheep and had started buying shares in the Gatarakwa farmers Company Limited which shares ended up becoming the property now known as Gatarakwa/ Gatarakwa Block IV/149 in respect of which the appellant now claims one-half share. The respondent claimed to have purchased the shares in respect of this property entirely with his own money with the appellant giving him no money at all towards its acquisition. Although the appellant paid salary for the housemaid during the purchase of this property which salary was KShs 140 per month, all the other household requirements were, according to the respondent, met by him. The respondent denied having received any money at all from the appellant, let alone all her salary earnings, towards the purchase of the Gatarakwa property and therefore disclaimed her joint proprietorship of the same with him on account of her contribution towards its purchase.

Concerning the Athi River property LR number 337/458, the appellant was not even aware that the respondent was buying it. According to him, she made no contribution whatsoever towards its purchase.

As to the Kariobangi plot number 346, the respondent contended that it was purchased by him during the months of March and April 1982, when the appellant had left the matrimonial home and was living away from him in Tumutumu. Although at this time the appellant was physically with the children of marriage at Tumutumu, the respondent, nonetheless, claimed to have continued and health

needs even though they were living away from him at Tumutumu. There was therefore, according to the respondent, nothing that could be attributed to the appellant as contribution towards the purchase of the Kariobangi property during her sojourn away from the matrimonial home.

The Kajiado/Olchoro-Onyore/2201 was purchased by the respondent in collaboration with one Amos Kinyanjui. According to him, during the purchase of this property there was in existence sharp disagreements between him and the appellant who then wanted to be transferred by the Teachers Service Commission anywhere away from him. The Teachers Service Commission, nevertheless, refused to give her such a transfer without his agreement or a separation order from a court of law. In such circumstances, according to the respondent, the appellant was in no mood to make any contribution towards the purchase of any property by him. The respondent totally denied that the appellant made any contribution at all towards the purchase of the Kajiado property.

Concerning the matrimonial home at Greenfield Estate, Phase 1, Nairobi – house number 82/447 – the respondent denied having received any contribution by the appellant towards its purchase. Indeed, he denied having received any money with which he traveled abroad from where he bought two motor vehicles one of which on his return to Kenya he sold and paid the deposit towards the purchase of the matrimonial home. The other of the two cars he gave to the appellant for her use but subsequently sold it as pointed out earlier in this judgment. The respondent explained that he had borrowed money from Sisi Savings and Credit Society and from his employer with which he went abroad where he bought the two old cars referred to above.

Sometime in 1990 the respondent decided to extend the kitchen and build a carport to the Greenfield Estate matrimonial home. For that purpose, he borrowed KShs 750 000 from Barclays Bank of Kenya Limited, Enterprise Road, Nairobi out of which he paid off the outstanding loan in respect of that home with the Housing Finance Company of Kenya amounting to KShs 363 107-90 and used the balance in the extension of the kitchen and the construction of the car-port. During this exercise, the appellant gave him KShs 30 000 for the purchase of crockery for the extended kitchen. Save for this sum of money, there was otherwise, according to the respondent, no financial contribution by the appellant towards the extension of the kitchen and the construction of the carport to the Greenfield Estate matrimonial home. Pursuant to a court order in the Nairobi Principal Magistrate's Court Maintenance carried away all the crockery purchased with the KShs 30 000 she had given to the respondent.

Regarding motor vehicle registration number KAE 682E make, Mercedes Benz saloon, the respondent told the superior court that he bought the said vehicle through a loan given to him by his employer, Johnson Wax (EA) Limited, who retained its log book and a signed undated transfer form in relation thereto. That loan as at the date the respondent gave evidence in the superior court was

outstanding at KShs 886 865-95. According to him, the appellant had nothing to do with purchase of this motor vehicle and made no contribution at all towards its purchase. As concerns motor vehicle registration KAC 495V, make, Toyota Hilux Pick-up, the respondent told the superior court that the same was jointly owned by Beki Auto Spares and Hardware Limited and the National Industrial Credit Corporation (NIC). The vehicle, according to him, does not belong to him nor the appellant who is neither a director, a shareholder nor an officer of the said company. There was, according to the respondent, no pending arrangements nor had there been past arrangements for the appellant to have any interest in this company whose businesses are in the nature of sale of motor vehicle spare parts and hardware both at Eastleigh in Nairobi and at Nyeri township and to which the appellant made no contribution towards its establishment nor towards the running of its businesses in either of its two places of operations.

Further in his evidence-in-chief in the superior court, the respondent disclaimed any contribution by the appellant towards the purchase of the two sofa sets, four beds and four mattresses, the television set, the Sony video recorder and the National video recorder referred to earlier in this judgment. According to the respondent, these items were personally purchased by him and were in the matrimonial home when on 24 March 1995 the appellant collected from the home what she considered to belong to her. She did not collect these items, as they did not belong to her. She left them in the matrimonial home.

In concluding his evidence-in-chief, the respondent told the superior court that throughout his marriage to the appellant he allowed her to use her salary on her own personal needs and the little else that she wanted to buy for the children besides whatever was missing in the house whenever he was out of the country which was approximately 7 days in a year since 1984. He otherwise personally catered for the maintenance of his household which included provision of food, clothing, health care, education for his children and family entertainment. As his retire from his employment on medical grounds in September 1995, the respondent had been earning a monthly salary of over KShs 100 000 and earned retirement benefits of between KShs 530 000 and KShs 540 000.

I have made no reference to the Uaso-Nyiro/NaroMoru West Block 1/141 piece of land which was also listed in the appellant's Originating Summons in the superior court as it was conceded by the parties to this appeal both here and in the superior court that the said property was registered in the name of the respondent's mother and as regards the Lang'ata property, the same was shown in the appellant's Originating Summons in the same court to be unidentified.

In his 51 typed-page-judgment dated and delivered on 14 November 1996, the Learned trial Judge who after setting out the case before him took an off-course discourse on women bordering on bias against the female gender and purported to give unsolicited guidelines on the law of property where spouses or former spouses lay claim on property used by them in the family, nevertheless, observed that in a

matter such as was before him, contribution of whatever form must be proved on evidence unless the same is admitted. Indeed towards the end of his unnecessarily long judgment, the Learned trial Judge had this to say:

“Where a spouse claims ownership or a beneficial interest in property registered in the name of the other spouse, the Court requires, and must be provided by the claiming spouse, cogent evidence to enable it to discover the right and interest claimed. Conclusion must depend upon an analysis of particular facts and detailed evidence, and of course, a proper application of recognized legal principles. Each conclusion would have to be the result of such an analysis. Where the evidence is meager and too slender to support the claim and there is a *prima facie* right in the defending spouse, the Court will not disrupt the existing rights and re-allocate or share them out.”

He then at the close of his Judgment said that in the case before him, he found no evidence of contribution which enabled the respondent to be relieved or saved from the family responsibilities so as to purchase the properties claimed. According to the Learned trial Judge, even as the respondent was acquiring the said properties, he continued to support the appellant and the children of their marriage. To the Learned trial Judge, there was insufficient evidence before him upon which he could hold that the appellant contributed towards the purchase of the properties in respect of which she sought on-half share of their total value in her Originating Summons in the superior court. He accordingly dismissed her Originating Summons with her and the respondent bearing their own respective costs. Against that dismissal the appellant has appealed to this court putting forward 8 grounds of appeal the gave a men of which was the Learned trial Judge’s failure to consider and appreciate her contribution towards the purchase of the properties set out in this judgment and hence her entitlement to one-half share of the said properties. Issues of the Learned trial Judge taking into account extraneous considerations and exhibiting a biased attitude against women in general are peripheral to the core issue of contribution.

In her submission of this court at the hearing of this appeal, counsel for the appellant submitted that the appellant’s claim to a share of the properties set out in this judgment was based on her contributions towards the purchasing of the same. Notwithstanding the Learned trial Judge’s tilted approach to the evidence before him against the female gender in general, nonetheless, the totality of the evidence before him did on balance of probabilities, according to counsel, establish such contribution to entitle the appellant to no less than one-third share of these properties.

The rejoinder of counsel for the respondent to the submission of counsel for the appellant was that the appellant’s right to share of the properties in question was in the realm of constructive trust in respect of which there was no evidence. It was for the appellant to prove on a balance of probabilities that she directly or indirectly contributed towards the acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to

indirect evidence available before the learned trial Judge, was unable to discharge. To counsel, therefore, she was not entitled to any share of the properties set out in this judgment.

The appellant's claim in the superior court was dependent on evidence of her direct and/or indirect contributions towards the acquisition of the properties listed in her Originating Summons in that court. Indeed, her counsel said as much in her submission to this Court at the hearing of this appeal. It is only with that kind of evidence that the trial court would have been able to say what its effect in law was for as was observed by Lord Morris of Both-Y-Gest in *Gissing v Gissing* [1971] AC 886 at page 898 C and D:

“The court does not decide how the parties might have ordered their affair: it only finds how they did. The court cannot devise arrangements which the parties never made. The Court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstances that harmony has been replaced by discord. Any power in the Court to alter ownership must be found in statutory enactment”:

So that in the instant appeal, the appellant is entitled to a share of the properties listed in her Originating Summons in the superior court and as are set out in this judgment was dependent on the existence of a resulting trust in her favor in regard to these properties such share being proportionate to her direct and/or indirect contributions towards their acquisition. As both the appellant and the respondent were in salaried employment, proof on a balance of probabilities of the creation of a resulting trust in favor of the appellant by evidence of her direct and/or indirect contributions towards the acquisition of the properties in question was necessary. From the evidence available before the Learned trial Judge which to a large extent I have endeavored to set out in this judgment, save for the KShs 30 000 which the appellant gave to the respondent and which sum of money was used for the purchase of crockery in the extended kitchen of the Greenfield Estate matrimonial home and which crockery was collected from this home by the appellant as indicated earlier in this judgment, one cannot with any amount of certitude lay a finger on any other evidence of direct and/or indirect contribution by the appellant towards the acquisition of the properties in respect of which she claimed entitlement to the extent of one-half share. Shorn off its extraneous escapade mentioned earlier in this judgment which could easily have been interpreted as being insensitive to the female gender, the judgment of the superior court was otherwise corrected in a matter of such as was before it. Evidence of contribution in whatever form towards the acquisition of the properties the subject-matter of the appellant's Originating Summons in that court had to be proved on a balance of probabilities unless the same was admitted. There was no such admission and proof of the same on a balance of probabilities was lacking. Any conclusion therefore by the Learned trial Judge in favour of the appellant based on the material available before him would have been no more than conjectural amounting to

deciding how the appellant and the respondent might have ordered affairs instead of finding how they did and devising arrangements which they never made besides ascribing to them intentions which they may never have had. It is for this reason that I would dismiss the appellant's appeal with the appellant and the respondent bearing their own respective costs of the said appeal. As Omolo and Lakha JJA do not agree, there will be a majority judgment of the Court in the terms proposed in the judgment of Lakha JJA.

OMOLO JA: I had the advantage of reading in draft form the judgments prepared by my Learned brothers, Gicheru and Lakha JJA. One feature common to both judgments is the conclusion that the Learned trial Judge appears to have been biased against the rights of this appellant and women in general over the issue of property acquired during the subsistence of a marriage. In my view, once it is accepted that a Judge was in fact biased against a party, then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic. I agree with Lakha JA that this appeal is to be allowed in the terms proposed by him and that there be a retrial of the Originating Summons before a different Judge.

NDERITU V NDERITU [1998]

COURT OF APPEAL OF KENYA AT NAIROBI

KWACH, SHAH AND PALL JJA

Date of Judgment: 30 June 1998

Case Number: 203/97

SOURCED BY: LAWAFRICA

CITATION [1997] LLR 606 (CAK)

Importance

The court analysed its previous decisions and began to develop a characteristic local jurisprudence on property acquired by spouses during coverture. The decision marks the high point for that line of reasoning that attempted to achieve equity in distribution of property between the spouses.

[1] Family law – Property of spouses – Property acquired from husband’s sole proprietorship businesses – Businesses run jointly by the spouses – Property in sole possession of husband – Wife contributed financially and non-monetarily – Wife awarded 30% share in the properties by trial court – Whether wife entitled to a 50% share – Section 17 Married Women Property Act.

Editor’s Summary

The appellant and respondent got married under Kikuyu customary law in 1968. The husband was in a charcoal selling business and the wife was a housewife. As the business was not prospering, the wife went back to her parents’ home until 1972. She returned to Nairobi and joined her husband in running a used clothes business. She continued working in these businesses except the times she had to remain at home due to ill health or confinement. The family had five children, the last three being born by Caesarean section. In 1985 the used clothes business was closed and a wholesale business opened, which again the wife was helping to run. As a result of these businesses, the husband was able to buy nine land properties, five motor vehicles and various household goods.

The marriage later got into trouble and in 1992 a suit for divorce was filed in court. The wife then applied in the superior court, by way of Origination Summons under the Married Women’s Property Act, seeking orders that all property acquired during the pendency of the marriage was jointly owned and that the said property should be sold and the net proceeds shared equally between the parties. The wife contented that she had contributed financially to the acquisition of the properties, while the husband played down her contribution. The trial Judge also considered the wife’s non-monetary contribution in taking care of the children and awarded her a 50% share of the matrimonial home at Tigoni and a 30% share in the remaining property. The lands was to be valued the cars sold and accounts taken for the business so as to determine the value of her 30% share therein.

The wife now appealed on the basis that the Judge erred in failing to award her a 50% share in all the properties.

Held:

1. There was evidence before the trial court that the appellant was engaged full time in helping to run and expand the business. There evidence to show that the caesarean sections underwent by the appellant were adequate justification to reduce her share to 30%; in any case, the pregnancies were for the welfare of the family.
2. The trial Judge erred in giving the wife only 30% contribution of the other properties. Where there is no clearly declared decision, the Court does not decide how much each party contributes but decides on an equally of division. *Latey on Divorce* (13 ed) at 319 considered.

Per curiam: The trial Judge was right in the following legal principles regarding the application:

- (i) The applicability of the Married Women's Property Act cannot be excluded on the ground that the marriage was according to customary law. *Karanja v Karanja* [1976] KLR 307 followed.
- (ii) For a wife to succeed in a section 17 application, all that she has to show is that (a) she is married to the husband; (b) the property in question was acquired during coverture; (c) she contributed directly or indirectly to the acquisition of the assets. *Olaly v Olaly* High Court civil case 1137 of 1994 disapproved.
- (iii) Indirect contribution by the wife to the family income by looking after the welfare of the family must form a basis for assessment just like financial contribution for a Kenyan African wife, this contribution would more often than not take the form to back-up service on the domestic front. *Kivuitu v Kivuitu* [1985] LLR 1411 (CAK) followed.
- (iv) The court should look at the respective contributions of the spouses and not take account of the rights and wrongs in the separation. *Cracknell v Cracknell* [1971] 3 All ER 552 adopted.
- (v) The burden is on the applicant to prove upon a balance of probability that she made a contribution towards the acquisition of the property in dispute. Dictum of Omolo JA in *Essa v Essa* [1995] LLR 384 (CAK) followed.

Appeal allowed, appellant to be awarded 50% of all properties.

Assessment

This case marks the apex of the line of reasoning exemplified by Justice Omolo's obiter in *Kivuitu v Kivuitu*. The obiter was adopted and approved by Justice Kwach in his judgment. In essence, an African wife by doing well her housewife duties, bearing and taking care of the children contributes non-monetarily to the

acquisition of property. Thus without more such a wife acquires a proprietary interest in property acquired by her husband during coverture. If in addition she contributes financially, either to improving the family welfare or directly to the purchase price, this contribution should also be taken into account in assessing her aggregate contribution. Hence where property is owned jointly, it is assumed that the wife made a contribution and that the beneficial interest therein is shared equally. Where property is in the husband's sole title, the wife's contribution would form a basis for identifying her share in the assets.

Justice Kwach, in discussing the wife's contribution during confinement, asserted, "the wife was putting her life at risk to augment the numerical strength of the family and I cannot think of a greater contribution than bearing children". It was an assertion that indicated the extent to which general property law principles had been jettisoned in favour of a *sui generis* family property regime.

This trend of reasoning deserves criticism for failing to give any consideration to spousal property rights and for implicitly adopting a community property system where it becomes almost impossible for spouses to own separate property. Without criticising community property regimes, which are designed to encourage family solidarity, such regimes should not be introduced into a common law country except by legislation.

In *Nderitu*, one feels that the Court is groping in the dark and exercising discretion according to some misty indiscernible principles. There is no mention of 'resulting trust', only of 'contribution', no mention of 'inference', only of 'intention'. One detects a casual dismissal of legal property rights and certain wantonness in the manner in which the Court exercises discretion to distribute property equally without attempting to quantify or give proportion of each spouse's contribution. The court made a presumption of equality in distribution, which had been resoundingly rejected in *Gissing*.

One does not see *Pettit* and *Gissing* being applied here; one is hard-put to discover sufficient rationale for this home-grown local law that disregards home-grown property statutes. In summary, *Nderitu* left property law in a dissatisfying state that could not endure the test of time.

Cases referred to in Judgment

East Africa

Essa v Essa [1995] LLR 384 (CAK)

Karanja v Karanja [1976] KLR 307

Kivuitu v Kivuitu [1985] LLR 1411 (CAK)

Olaly v Olaly High Court civil case 1137 of (UR)

United Kingdom

Cracknell v Cracknell [1971] 3 All ER 552

Chapman v Chapman [1969] 1 WLR 1367

Falconer v Falconer [1970] 3 All ER

Watchtel v Watchtel [1973] 1 All ER 829

Judgment

KWACH JA: Tabitha Wangeci Nderitu, the appellant, (hereinafter called ‘the wife’) got married to Simon Nderitu Kariuki, the respondent (hereinafter called ‘the husband’) in 1968 under Kikuyu customary law, to which they are both subject. The couple have five grown-up children, four sons and a daughter. By 1992, the marriage had irretrievably broken down and the wife filed a suit in the superior court for judicial separation and maintenance.

The wife also took out an Originating Summons, under section 17 of the Married Women’s Property Act of 1882 (the Act) against the husband, seeking amongst other orders, a declaration that a number of properties (movable and immovable) acquired by joint efforts and funds of both parties during their marriage, and registered in the sole name of the husband, and in his possession, are owned jointly by the wife and the husband. The properties in question were:

- (a) Plot LR number Othaya/Kihungiru/637
- (b) Plot LR number 36/11/261 Nairobi
- (c) Plot LR number 36/11/384 Nairobi
- (d) Plot LR number 20911/1240 Nairobi
- (e) Plot LR number 209/1692 Nairobi
- (f) Plot LR number 209/1233 Nairobi
- (g) Plot LR number 36/434/VII Eastleigh, Nairobi
- (h) Plot LR number 36/685/1 Eastleigh, Nairobi
- (i) Plot LR number 209/2541/2 Nairobi
- (j) The matrimonial home on Plot LR number 7660/89 and 90 Tigoni.

The movables consisted of five motor vehicles, two television sets, a video recorder, an electric cooker, a fridge and an assortment of household goods. The wife also claimed an interest in a wholesale business on River Road, Nairobi called “Gobbs Wholesales”, in respect of which the husband was registered as the sole proprietor.

The husband filed an affidavit in which he denied the wife's claim. Certain paragraphs of the affidavit sworn on 26 June 1995 are important and I will read them out in full. He deponed.

- “(7) That after the applicant settled in Nairobi, I instructed her on how to run the mitumba business for convenience of administration for the family purposes only. I let her do the selling while I did the looking for clothes and other side businesses.
- (8) The applicant brought the proceeds if the sale to me which I put in my account at the Kenya Commercial Bank, Tom Mboya Street.
- (11) That the properties enumerated in the applicant's affidavit are not jointly owned by the applicant and the respondent. The respondent having purchased all out of his earnings and registered them in his name and further, the applicant has no knowledge whatsoever of how the said properties were acquired. She only alleges we bought them jointly by virtue of her having been married to me.”

As can be seen from his affidavit, the husband was emphatic that the wife had made no contribution to the acquisition of the assets which he regarded as his own. At the trial before Hayanga J both husband and wife gave evidence, and in a reserved judgment the Learned Judge gave the wife 50% interest on the matrimonial home at Tigoni. In relation to the rest of the properties (real estate and movables) and the wholesale business, the Judge gave the wife only 30% leaving the husband 70% all the way. The wife was aggrieved by this part of the Judge's order as she felt she should have been given 50% share in all properties. It is against that part of the Judge's order that she now appeals to this Court. That is the bottom line or the import of the four ground of appeal contained in her Memorandum of Appeal.

It is common ground that the wife is a married woman within the meaning of section 17 of the Act and that all properties listed in the inventory of assets were acquired during the subsistence of the marriage. It is worthy of note that when the husband first met the wife, he was a mere charcoal seller, and a hawker of sorts. The Act does not discriminate between statutory and customary law marriages. All that a wife has to show is that she is married to the husband at the time of launching her application; that the property in question was acquired during the subsistence of the marriage; and thirdly, that she contributed directly or indirectly to the acquisition of the assets. It is not enough for her simply show that during the period under review she was sitting on the husband's back with her hands in his pockets. She has to bring evidence to show that she made a contribution towards the acquisition of the properties. That is a burden she must discharge on a balance of probabilities.

I must say at once that I do not agree with the restrictive interpretation Shah J (as he then was) sought to place on the application of section 17 of the Act in the case of *Olaly v Olaly* High Court civil case 1137 of 1994 (UR) where he is reported to have expressed the view that it only covers the matrimonial home. I doubt if my brother had the benefit of full argument on the point, but be that as it

may, both the clear language of the section, and the weight of authority, leave no doubt at all that the section applies to all property across the board acquired by joint contribution during the subsistence of the marriage. Hayanga J found as a fact that the wife had made indirect contribution to the assets but in deciding to give the wife a lower share of 30% in the properties other than the matrimonial home at Tigoni, the Judge said:

“In this case there is evidence which I accept of the wife selling clothes, living with children in their rural home, paying fees for the daughter in United States International University and managing the wholesale business. There is however also evidence that caesarian deliveries reduced for those periods she was delivering her capacity to exert herself in gainful activity.”

Later in his judgment the Judge commented again on this point, saying:

“The reason for this is that the wife’s major contribution was in respect of the children’s maintenance when they were young, but in the succeeding years they were now schooling and there was no evidence that she paid for their fees, apart from fees for the only girl out of the five children. I have also taken note of the delivery condition when she sued to suffer and when she would not really be productive.” [Emphasis mine]

The view urged by Mr Gaturu, for the husband, and accepted by the Judge, that deliveries by caesarean section somewhat incapacitated the wife and jettisoned her contribution, is not based on any medical evidence, no medical evidence having been led at the trial on this point. But even if that was the case, which it was not, the wife was putting her lie at risk to augment the numerical strength of the family, and I cannot think of a greater contribution than bearing children. The wife managed the wholesale business and handed over the proceeds from the business to the husband who banked it in his personal account. The husband suggested/in his evidence, and Mr Gaturu submitted before the Judge and before us, that since the wife had not made any direct financial contribution she was not entitled to any share. As I have already said contribution need not be only in the form of money. The court has to look at the big picture. As to how the issue of contribution is to be determine has been settled by this Court in the case of *Kivuitu v Kivuitu* [1985] LLR 1411 (CAK). In that case this Court held that the wife was entitled to a half share in the matrimonial home because she had made a substantial indirect contribution to the family income and assets by using her income to pay household expenses, to prepare food and clothing for the children, organising their schooling, and generally enhancing the welfare of the family.

There is a passage in the judgment of Omolo Acting JA (as he then was), who has since joined this Court as a full member, in which he stated the law in regard to indirect contribution which merits particular emphasis. At 248 the Learned Judge said:

“For my part, I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to

assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even a bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them, however, make a contribution to the family welfare and assets. So that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the Courts must take it that such property, being a family asset, is owned in equal shares. Where, however, such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to the Court under section 17 of the Married Women's Property Act of 1882, so that the Court would have to assess the value to be put on the wife's non monetary contribution. I can find nothing in *Chapman v Chapman*, *Falconer v Falconer*, or *Karanja v Karanja*, which would force me to the conclusion that only monetary contribution must be taken into account. Any such limitation would clearly work an injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by. The case of *Watchtel v Watchtel* [1973] 1 All ER 829 provides full support for this position."

This passage, which I fully endorse and adopt chapter and verse, kills two birds with one stone, so to speak. It settles what the law is in Kenya on the point of indirect contribution and also provides a full answer to Mr Gaturu's submission. A wife's contribution, and more particularly a Kenya African wife, will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a trial Judge hearing an application under section 17 of the Act to take into account this form of contribution in determining the wife's interest in the assets under consideration.

In the final analysis, both on the evidence and the weight of authorities, the wife proved that she made an equal contribution, albeit indirect, as the husband, and she is entitled across the board to an equal share in all the properties registered in the husband's name. That being the case I am unable to see the basis upon which the Judge decided to give her only 30%. In doing so, he was clearly wrong and that part of his order cannot be allowed to stand. I would allow this appeal, set aside that part of the order giving the wife 30% interest over designated properties and assets and substitute therefore and order giving her 50% share across the board except plot LR number 209/1233 Muranga Road, Nairobi, in respect of which Denedict Kariuki, a son of the couple, is the registered proprietor. The Judge did not advert to the issue of registered proprietor. The Judge did not advert to the issue of costs. The wife is entitled to her costs on the motion. I would also award her the costs of this appeal.

As Shah and Pall JJA also agree, this appeal succeeds and is allowed. That part of the order of Hayanga J by which he gave the appellant only 30% interest in the properties and assets in dispute is hereby set aside and substituted by an order giving the appellant 50% across the board except plot LR number 209/1233 Muranga

Road, Nairobi. The appellant will also have the costs of the motion and of the appeal.

SHAH JA: Simon Nderitu Kariuki (the respondent) and Tabitha Wangeci Nderitu (the appellant) became lawfully wedded husband and wife in 1968 under Kikuyu customary law. In 1992 or thereabouts the relations between them soured and there is a judiciary separation suit pending them, being High Court Matrimonial Cause number 35 of 1992.

After filing the proceedings for judicial separation the appellant (hereinafter referred to as “Tabitha”) took out an Originating Summons under section 17 of the Married Women’s Property Act of 1882 of England claiming a declaration that all properties movable and immovable, acquired during the penance of the marriage by both parties are owned jointly, in equal shares, by them. She also sought other orders which would follow if the declaration sought was granted. I will henceforth refer to the respondent as “Simon “.

As this is a first appeal it becomes incumbent upon me to review the evidence. Tabitha is educated up to Standard IV. When she married Simon, Simon was selling charcoal at Eastleigh in Nairobi and she was a housewife. As the charcoal business was not sufficiently lucrative, Tabitha went home, that is, to Othaya in Nyeri where she stayed until 1972 doing some small jobs. She returned to Nairobi in 1972 and joined her husband in selling second hand clothes. The children of the marriage were also in Nairobi. Their business and the later acquired business (which will be referred to later) prospered and Simon was able to buy nine land properties, about five motor vehicles and household goods like two colour televisions, an electric gas cooker, radio, sofa set, refrigerator etc. In addition Simon acquired two farms at Tigonini being plot numbers 7660/89 and 7660/90. Tabitha said that she worked for Simon’s business almost full time and that all the properties were acquired from the business income and no loan was used to expand the business. In 1985 Simon opened another business and called it Gobbs Wholesalers of which he was the sole proprietor. That is when the second hand clothes selling business at Gikomba was closed. The business of Gobbs Wholesalers obviously thrived and Simon was able to buy several properties and the living standards of the family improved. Tabitha was collecting rents and passing the same on to Simon. Tabitha was also managing the business of Gobbs Wholesalers. After the parties parted ways, Simon would have nothing to do with Tabitha. The children are all grown up. The daughter, Susan, who is now 23 years of age lives with Tabitha. The other two children are, Antony Maina (now 27) and Samuel Mwangi (now 22). Until their separation, the parties lived at Tigonini in a five bed-roomed house. Apart from Antony, Samuel and Susan, the couple has two more children namely, Samuel Mwangi and John Gati. Susan, Samuel and John were born by caesarean sections. Tabitha denied being sickly and weak and she stated that three different caesarean section births did not affect her work for long.

Simon stated that Tabitha was just a housewife prior to 1972 and that after delivery of their third child she disappeared with the young child, leaving other children with Simon. He retrieved, through the efforts of Tabitha's father, his cheque book and ledger book. After a family discussion, Tabitha returned to Simon in Nairobi looking "not healthy". She did not work, he said and delivered another child in October, 1974. As she was weak, when could not do any work. He said he carried any other business of hawking alone after buying second clothes from Asian traders. He made small profits. He bought several properties, one at Eastleigh along Wood Street. He bought another plot along Limuru Road. The one on Wood Street (now Kipanga Street) is plot LR number 36/section VII/434. One along Limuru Road is plot number LR 309/1240. He bought also plot LR number 209/254/2, Nairobi. Simon was insistent in saying that Tabitha did not contribute anything towards the purchase or management of the properties or running of the business of Gobbs Wholesalers. He was emphatic that Tabitha should get nothing as she contributed nothing and that all properties were acquired after marriage. He accepted, reluctantly, that he taught Tabitha how to run the "Mitumba" (second hand clothes) business.

The Learned Judge dealt with the conflict of evidence which I between Tabitha and Simon by accepting the evidence of Tabitha. He said:

"In this case there is evidence which I accept of the wife selling clothes, living with children in their rural home, paying fees for the daughter in USIU and managing the wholesale business. There is however also evidence that caesarean deliveries reduce for these periods she was delivering, her capacity to exert herself in any gainful activity.

I accept that these properties were acquired during tendency of marriage. I am also of the view that there was no agreement that the wife was completely to be excluded from what they were acquiring. In fact the husband agrees that whatever they have is really for the children but that does not diminish the interest of the wife of the property acquired at the time of their marriage".

In my view after following decisions of this court in *Kivuitu v Kivuitu* (1985) LLR 1411 (CAK) (although the property in *Kivuitu* case was registered in the joint names of Kivuitu) and *Essa v Essa* [1995] LLR 384 (CAK in which case also the property was registered in the joint names of the Essas), the Learned Judge correctly applied what the Learned author says in Latey on Divorce (13 ed), page 319, paragraph 2.

"In the absence of a clearly declared decision the Court does not consider how much one party or the other contributes but decides on equality of division.

In this particularly case there was evidence, accepted by the Learned Judge, who saw and Judged the demeanour of Tabitha, that she was engaged full time in helping Simon run and expand his business. I see no reason to disagree with the Learned Judge on his findings of facts save in respect of his reducing the wife's share to 30% because she underwent three caesarean deliveries. incapacitated her to

the extent that the Learned Judge thought. At least some sort of medical evidence could have helped but I am not convinced that caesarean deliveries incapacitate wives from working for such long periods as to call for a reduction of their contribution to the welfare of the business and the family. That is where, I think, with respect the Learned Judge erred. Whilst the Learned Judge gave a half portion of the matrimonial home to the wife he erred in giving her 30% of the other assets acquired during the substance of the marriage.

I would therefore allow this appeal and order that all the assets which are in the name of husband be divided equally between the parties. I would also order that the appellant pays the wife's costs here and in the superior court.

PALL JA: This is an appeal from the judgment of the High Court of Kenya at Nairobi (Honourable Mr Justice Hayanga) dated 25 February 1997 in its civil case number 2153 of 1992 (OS).

This appellant sued the respondent in the superior court by way of an originating summons under section 17 of the Married Women Property Act 1882 of England for orders that all properties, movable and immovable, acquired by the joint funds and efforts of the appellant and respondent during their marriage and registered in the name of the respondent and or in his possession are owned jointly by the appellant and the respondent. She further prayed for an order that the said properties be sold and the net proceeds of the sale be shared equally between the appellant and the respondent.

By her supporting affidavit of 21 August 1992 the appellant deponed, and it is not in dispute, that the appellant was married to the respondent in the year 1968 under the Kikuyu Customary Law and had lived with him as his wife upto about December 1992. There are five children of the marriage who are all adults and settled in life except their daughter Susan Wambui, born in October, 1974, who is still a student at the United States International University in Nairobi. She further deponed, it is again not in dispute, that before their marriage in 1968, the respondent did not own any immovable property. All the nine immovable properties and the vehicles and other movable assets mentioned in her supporting affidavit were acquired during the subsistence of their marriage. All immovable properties are registered in the name of the respondent and all the movable assets and vehicles are in his possession. She further deponed that during the period she had been living with the respondent she financially contributed towards the purchase of the assets and the welfare of the family. She thus claimed an equal share in all the aforesaid properties.

By his replying affidavit dated 26 June 1995 the respondent deponed (*inter alia*) that the applicant did not earn a living. She was, however, looking after his, father's coffee plants; that he had a piece of land approximately 3 acres which was enough to keep her busy; that he established his business of charcoal selling on his own initiative and without any monetary or other assistance from the appellant. However, he taught her how to run the "Mitumba" (second hand clothes selling)

business and allowed her to do the selling of clothes while he was looking for more clothes to sell and doing other side businesses. He also deposed that the appellant brought the proceeds of the sales to him which he would bank in his bank account with Kenya Commercial Bank, Nairobi.

The parties also gave *viva voce* evidence. The appellant in her oral evidence, testified that three last born children born in 1972, 1974 and 1976 respectively were all delivered by caesarian sections. She however denied that she was sickly and weak because of the caesarian sections. She had attended school upto standard IV but she knew how to do business and she could read and write. In 1972 she came back to Nairobi, to live with the respondent, from the respondent's native house at Othaya in Nyeri. When she was in Othaya she was doing small jobs for money for other people. Back in Nairobi, she started selling second-hand clothes. The respondent closed his charcoal business as it "did not suffice". By that she probably meant that it did not generate sufficient income. The respondent called her to Nairobi to be his manager for the second hand clothes selling. Apart from the clothes selling business they did not have any other business until 1985 when the respondent opened a wholesale business known as "Gobbs Wholesalers". They then, closed the second-hand clothes business and concentrated on the wholesale business which again she was managing. All the properties were bought with the income from their said business activities. In December 1992 when they were living in one of their two farms in Tigoni, trouble started between them and she left the respondent. She also then ceased to manage the said wholesale business. According to her the respondent had a monthly rental income of about KShs 200 000 from the said immovable properties. She further said that she knew that the respondent had given one of the said properties known as LR 209/1233 Murunga Road Nairobi to their son, Benedict Kariuki.

The respondent in his oral testimony said (*inter alia*) that the appellant had been a mere housewife. She had not been working. In 1972 she came down to Nairobi to deliver their third child by a caesarian section. After the delivery she disappeared with the young child to her parents' house and stayed there for one year. She joined him again either late in 1973 or early 1974 and she did not look healthy. She became pregnant again and delivered their fourth child in October, 1974 through a caesarian section. She was weak and could not do any work. She delivered the fifth child in 1976 again through a caesarian section. She did not work and never managed the wholesale business, he said. Also she never helped him to sell the second-hand clothes. He however, conceded that before he married, he had no property.

The Learned Judge accepted the appellant's evidence that she was selling second-hand clothes and managing the wholesale business. He also accepted that all the properties were acquired during the subsistence of the marriage and that there was no agreement between the spouses that the appellant was completely to be excluded from the properties which they were acquiring. He went on to hold that

where there was no such intention to exclude the appellant, the beneficial interest in any property acquired by the joint efforts of husband and wife belonged to them “jointly”. He also found that the appellant was telling the truth when she said that she had been managing the wholesale business and, he thought the respondent was not being candid with the Court and was trying to conceal his capital denying the appellant’s participation in the business without getting any salary. On the other hand, he accepted the appellant’s evidence that she had been selling clothes, living with her children in their rural home, paying the fees for the daughter in the United States International University in Nairobi and managing the wholesale business. He also acknowledged that her indirect contribution to the family income, looking after the children and enhancing the welfare of the family were just as important as a direct financial contribution towards the acquisition of the disputed properties. He also acknowledged that the appellant’s major contribution was in respect of bringing up the children. But the Learned Judge then said:

“There is however evidence that the caesarian deliveries reduced for those periods she was delivering, her capacity to exert herself in any gainful activity.”

He took into account that the appellant had paid the fees for her daughter alone and that there was no evidence that she paid for the fees of the other children when they were schooling. He also “took note of the delivery condition” when the appellant used to suffer and would not be really productive. For these reasons he awarded 50% share of the matrimonial home at Tigoni i.e. LR number 7660/89 to the appellant and so far as the rest of the property both immovable and movable is concerned he gave 30% share to the appellant and 70% to the respondent. He also ordered that all the motor vehicles should be sold and the proceeds be shared in the aforesaid proportions. So far as the wholesale business is concerned he ordered that accounts be taken in order to determine the capital value and yearly profits thereof for all the time that the business had been existing and each party’s share should be calculated again in the aforesaid proportions.

There was disagreement between the parties as to who was responsible for the separation of the spouses. The Learned Judge quite rightly did not take any account of that dispute. In *Cracknell v Cracknell* [1971] 3 All ER 552 Lord Denning MR said:

“In determining the shares in the matrimonial home of spouses who had separated the Court looked to their respective contribution and took no account of rights and wrongs of the separation.”

The appellant being dissatisfied with the judgment of the superior court now appeals. The burden of the appellant’s appeal is, so far as I can see it, that the trial Judge erred in law and in fact by failing to award 50% of all the properties in dispute to the appellant. It is also noted that there is no notice of cross appeal. Nor is there any notice by the respondent of other grounds for affirming the decision of the superior court.

The Learned Judge correctly held that the applicability of section 17 of the Married Women's Property Act cannot be excluded simply because the marriage was according to the Kikuyu custom and tradition. (See *Karanja v Karanja* (1976) KLR 307). He correctly followed *Kivuitu v Kivuitu* (1985) LLR 1411 (CAK) where the Court of Appeal held that indirect contribution by the wife to the family income by looking after the welfare of the family must form a basis just like a financial contribution. He rightly drew inspiration from the judgment of Omolo JA in *Essa v Essa* [1995] LLR 384 (CAK) (UR) that the burden is on the applicant to prove upon the balance of probability that she made a contribution towards the acquisition of the property in dispute.

The Learned Judge having given the appellant 50% share in one property, was he justified in reducing her share in the rest of the properties to 30%?

As I have already pointed out, to the Learned Judge the appellant's major contribution was in respect of welfare of the children when they were young. But he said in the succeeding years she paid school fees for one child only and there was no evidence that she paid for the school fees of the other 4 children. This was one reason for his reducing her share in the rest of the disputed properties. However as the Learned Judge has held that the appellant was entitled to a share in both the capital and business of the respondent, it does not matter who provided for the fees of the other children. It must have come out of common fund of the family.

The other reason for reduction of the appellant's share according to the Learned Judge was that because of her delivery condition, she was not really as productive as she should have been.

Apart from the respondent's bare word that the appellant was sickly and weak because of the three caesarian deliveries, there is no evidence to support him. If she was sickly and weak to the extent that she could not exert and attend to the business, one would have expected some medical evidence by way of medical bills etc. There is no such evidence. The bare word of the respondent who had already been discredited by the Learned Judge as not being candid could not be relied upon to form a basis for reducing the share of the appellant to 30%. Against this evidence of the respondent, there is the evidence of the appellant denying that she was sickly and weak and because of that she was unable to work. The Learned Judge having declared the appellant as a witness of truth should have held that the appellant was not sick and weak which he unfortunately did not do. Moreover, even if for the sake of argument, we accept that for sometime immediately before as well as after each delivery, the appellant was unable to exert and participate fully in the business, it was the respondent who was responsible for her pregnancies. Obviously, the appellant contributed to the enhancement of the welfare of the family as the pregnancies brought about the progression of the progeny of the respondent. He alone could not have achieved it.

Thus, in my view the Learned Judge did not have any good reason to reduce the share of the appellant in respect of the rest of the properties acquired during her marriage with the respondent once having granted her 50% share in one properties. At least no such reason appears upon a careful perusal of his judgment. He misdirected himself in evaluating the evidence before him and as a result arrived at a wrong conclusion.

I would therefore allow the appeal and set aside the judgment and decree of the superior court to the extent it gives less than 50% share of the disputed properties to the appellant and would order that the appellant be awarded 50% of all the disputed properties subject matter of this litigation as set out in paragraphs 5 and 6 of the affidavit of the appellant sworn on 21 August 1992 in support of the Originating Summons. The costs of this appeal shall be borne by the respondent. I would also award the appellant costs of the Originating Summons in the superior court.

KAMORE V KAMORE [2000]

COURT OF APPEAL OF KENYA AT NAIROBI

TUNOI, SHAH AND BOSIRE JJA

Date of Judgment: 31 March 2000

Case Number: 63/98

SOURCED BY: LAWAFRICA

CITATION: [1998] LLR 714 (CAK)

Importance

Kamore marks a milestone in the jurisprudence at the junction of family and property law in Kenya. By going back to the first principles by its consideration of the doctrine of trust Kenyan law and finally been fastened onto sure mooring. *Kamore* also adopts justice Gicheru's dicta in *Nderitu* and insists on the need to find evidence of contribution. The demur to sound property principles marks the dawn of a reworked local jurisprudence of property acquired by spouses during coverture.

[1] Family law – Property of spouses – Function of the court under a section 17 application Married Women Property Act 1882 – Jointly held property – Whether presumption of advancement applies – Properties held solely by the husband – Whether there was evidence of contribution by wife – Whether trust can be implied in the circumstances – Whether court can transfer proprietary interest from one spouse to another – Section 17 married women Property Act 1882.

[2] Family law – Proceeding for determination of matrimonial property – Natural justice – Failure to cross-examine wife on an application for determination of proprietary interest – Advocate instructed not to cross-examine – Subsequent application to cross-examine refused – No appeal lodged against refusals – Whether the question of natural justice could be taken first during the appeal against the substantive orders.

Editor's Summary

The appellant and respondent cohabited as husband and wife from 1974 to 1981, after marriage at St Andrew Church Nairobi. The marriage was blessed with three children, all boys. In 1981, the couples ceased cohabiting. In March 1983, the wife filed for divorce and the decree nisi was obtained in September 1983. The wife filed this Originating Summons in October 1983 praying for her share in some four properties acquired during coverture. Two of these properties were in the joint names of the spouses but were in the possession of the husband. The other two properties had been in the name and sole possession of husband, although one of them had since been sold. The wife claimed beneficial interest to half shares in the four properties.

During the hearing of the evidence, after a number of adjournments the Court refused to allow an adjournment prayed for by the advocate holding brief for the

husband's instructed advocate. The Court proceeded to hear the wife's case. The advocate holding brief for the husband did not cross-examine the wife purportedly on instructions. After close of the wife's case the Court set a date for submissions. The instructed advocate, who had not been in court during the hearing, applied to have orders of the Judge set aside on the ground that the advocate holding brief had not acted according to instruction. The application was dismissed but no appeal was filed against the dismissal.

The trial Judge made orders that the four properties be sold and the wife receive half share of the net proceeds from sale on the ground that she was entitled to had share from them. The husband lodged this appeal. The parties owned the first two properties jointly. The third property was acquired in May 1983 and sold to the third party on the same day. The fourth property was acquired in July 1983 and charged to another party. A further charge was created in 1990 in respect of this property. The appeal court had to determine whether the wife had contributed to the acquisition of these properties which were acquired after the cessation of cohabitation. Husband also argued the ground that there had been failure of natural justice since he was not availed an opportunity to cross-examine the wife or produce evidence in rebuttal.

Held:

1. It is too late in the day to argue the issue of natural justice during the proceeding. In any case the trial was fully justified in refusing to grant any further indulgence to the appellant or his advocate, considering the course of event. The appellant chose his counsel and must bear the consequences
2. When a property is acquired during the course of coverture and is registered in the joint names of both the spouses the Court in normal circumstance must take it that such property, Being a family asset, is acquired in equal shares. The trial Judge was therefore right in finding that the first two properties were jointly owned.
3. The court will not make a finding of presumption of advancement or a presumption of resulting in favour of the wife without evidence of the express or implied intention of the donor or settlor. *Marie Ayoub and other v Standard Bank of South Africa Ltd and another* [1963] EA 619 followed. In regard to the third property, there was no evidence of any implied or resulting trust in favour of the wife.
4. In relation to the fourth property, there was no evidence of contribution by the wife. The property was acquired two years after coverture and the wife had not satisfied the burden in proof to show that her husband was holding a share of the property in trust for her.
5. The court under a section 17 application has no power to pass proprietary interest from one spouse to another. *Pettit v Pettit* [1969] 2 All ER 385, *Gissing v Gissing* [1971] AC 888, adopted; dictum of Gicheru JA in *Kimani v Njoroge* [1997] LLR 553 (CAK) approved.

6. Even if the trial court found that there was a resulting trust in the properties held solely by the husband, would have power to order the proprietary interest to pass from one spouse to another. It could only order that the husband pay the wife appropriate share of the value of the property after market valuation by a reputable valuer.
7. Regarding the first two jointly held properties the Court would take consideration that the husband had been in sole possession of the same since 1983 when the litigation began. To compensate the wife for loss of user, she would be given 60% share of both properties. The properties to be valued by an independent valuer and each party to have to liberty to buy out the share of the other party.

Per curiam: In England the Matrimonial Homes Act of 1967, later replaced by the Matrimonial Proceedings and Property Act of 1970, and Matrimonial Causes Act of 1973 were enacted as response to the decisions in *Pettit v Pettit* and *Gissing v Gissing*. However, in Kenya, until such time that some law is enacted to give proprietary rights to spouses distinct from registered title rights, section 17 of the Married Women's Property Act must be given in the said interpretation as the said two cases.

Gissing v Gissing opened a way to seek relevant relief by pleading trusts, express, implied or resulting. Such a claim can be brought by way of a declaratory suit.

Assessment:

In a sense, *Kamore* heralds the coming of age of Kenyan inter-spousal property law. Whether by chance or design, whether because the Court was well advised by counsel or because the Court well advised counsel the Court in *Kamore* perched on the two English cases that the best set out the principles to apply in a determination of inter-spousal property rights. The court after analyzing the decisions in *Pettit* and *Gissing* on its power under a section 17 application, resoundingly concurred:

“We would add our own observations, that is, to say that until such time some law is enacted, as indeed it was enacted in England as a result of the decisions in *Pettit v Pettit* and *Gissing v Gissing*, to give proprietary right to spouses as distinct from registered title the section 17 of given the same interpretation as the Law Lords did in the said two cases.”

Finally, the Kenyan Court of Appeal had confronted the doctrine of resulting trust. The court approved Justice Gicheru's dictum in *Kimani v Kimani* to the effect that sufficient evidence would have to be present to justify a finding of trust advancement. Otherwise, the Court would not interfere with the existing property rights. The court in *Kamore* also recognized that a party seeking relief on the basis of trust could bring a claim by way of a declaratory suit.

While the decision in *Kamore* went a long way in clarifying the law, it still failed to distinguish between inference of a common intention and imputation of

trust based on the conduct of the parties. In this regard, *Lloyds Bank v Rosset* packages the principles in *Pettit* and *Gissing* into two simple easily understandable categories.³¹

Kamore could also be criticised for its failure to reconcile the approved English authorities with its own earlier jurisprudence as exemplified in *Kivuitu*, *Essa* and *Nderitu*. One gets the impression that their Lordships were not aware of the prevailing jurisprudence of the Court. This impression, it is contended, must be at least partly wrong because one of the Judges in *Nderitu* sat in the bench of this case. Still, the unnerving total failure of the Court to advert to these previous decisions leaves the family law of property in an unsatisfactory state.

The question therefore still remains to be asked: will the Court presume contribution and resulting trust in favour of a wife who makes non-monetary contribution to the family welfare through taking care of the children of the marriage? Will equality of division be presumed if the wife can prove substantial contribution to the acquisition of property by her husband?

Cases referred to in judgment

East Africa

Ayoub and others v Standard Bank of South Africa Ltd and another [1961] EA 743

Ayoub and others v Standard Bank of South Africa Ltd and another [1963] EA 619

Kimani v Njoroge [1997] LLR 553 (CAK)

United Kingdom

Gissing v Gissing [1971] AC 888

Pettit v Pettit [1969] 2 All ER 385

Standing v Bowring (11) [1886] 31 CHD 282

Judgment

This is an appeal from a decree of the superior court (Etyang, J) dated 11 December 1997 by which the Learned Judge made the following orders of and concerning four properties in dispute between the parties:

- “1. The property registered LR Nairobi/Block 32/26 situated in Golf Course estate within Nairobi is jointly owned by the applicant and respondent in equal shares. That property he sold and net proceeds of sale be divided equally between the applicant and respondent.

31 See assessment of *Gissing v Gissing* above.

2. The property registered in LR Ngong/Ngong/3821 is jointly owned by the applicant and respondent in equal shares. The same be sold and the net proceeds of such sale be shared equally between both the applicant and the respondent.
3. Property registered as Ngong/Ole Kesasi/35 in the name of Pentecostal Evangelistic Fellowship of Africa had been the joint property of the applicant and respondent. The applicant is entitled to half share of the proceeds of sale of this property which is to be paid to her forthwith.
4. The property LR 19040 being LR 1160/211 original number 1160/155/20 as more particularly described in certificate of title exhibit 19 was the joint property of the applicant and the respondent in equal shares and the same be sold and net proceeds hereof be shared equally between the applicant and respondent.”

The appellant is aggrieved by these orders and hence this appeal.

The proceedings in the superior court were begun by an Originating Summons (OS) without setting out the law or rules of procedure under which the said OS was brought. The OS application sought orders substantially as were made by the Learned Judge.

The first three grounds of appeal argued by Mr Ngatia who led Mr Oduol at the hearing of this appeal are as follows:

1. “That the Learned trial Judge erred in the circumstances of the case in proceedings to write a judgment without according the appellant an opportunity to put forward his defence contrary to the rules of natural justice.
2. That the Learned trial Judge erred in the proceeding on the basis that the applicant did not examine the first respondent and that the appellant did not avail himself to give oral evidence.
3. That the Learned trial Judge erred in proceeding on the basis that the appellant was given no opportunity to cross examine the first respondent but declined to do so.”

We will deal, first, with the said three grounds of appeal which were argued together by Mr Ngatia. The record shows that on 15 November 1996 the superior court made the following order:

“It is the intention of the Court to proceed with the substantive hearing of this cause. The two applications will be heard and determined at an appropriate stage in the proceedings. Hearing of the main cause to proceed.”

At that stage Miss Kamango holding brief for Mr Mukuria for the present appellant asked for a short adjournment to inform Mr Mukuria to come and cross-examine the respondent. The superior court granted the adjournment as sought. At 11:30am on the same day when the Court re-convened for the hearing Miss Kamango informed the Court that she was unable to contact Mr Mukuria and that she was

herself not in a position to proceed with the hearing of the main cause. She applied for an adjournment. Miss Karua, for the respondent opposed that application. Etyang J granted the adjournment directing that the respondent's case was to proceed to hearing next time with or without the presence of the appellant's advocate. The hearing of OS was then, by agreement of counsel, set for 16 December 1996.

On 16 December 1996 the parties and their counsel assembled in court when Mr Muia appeared for Miss Jane Mburu for the interested party. The Learned Judge then ordered that the application for leave to withdraw (cease acting) be served on the interested party and stood over generally the hearing of that application.

Miss Karua pointed out to the Court that she was ready to proceed. Miss Kamango however was not ready and informed the Court that the appellant wanted Mr Mukuria to personally conduct the hearing. The appellant was not in court.

The Learned Judge rejected this further application for adjournment and directed that the suit do proceed to hearing immediately. He so ruled at 4:00pm on 16 December 1996.

Miss Kamango informed the Learned Judge that she was instructed by the appellant not to cross-examine the respondent. Therefore Miss Karua closed her client's case and the Learned Judge called for written submissions which were to be filed by 20 January 1997. The respondent's counsel handed in her submissions on 20 January 1997. At that stage Mr Mukuria was present in court and sought leave to cross-examine the respondent, saying that Miss Kamango had no instructions to say what she told the Judge earlier. The Learned Judge after considering the sequence of events gave the appellant two weeks time to file a formal application to have the Learned Judge's orders of 16 December 1996 set aside or varied. Such an application indeed was filed but was dismissed after the Learned Judge once again having considered the sequence of earlier events. Although Mr Mukuria obtained leave to appeal against the Learned Judge's refusal to set aside or vary the orders of 16 December 1996 no such appeal was lodged.

In our view it is too late in the day, now, to argue the first three grounds of appeal and in any case we say that the Learned Judge was fully justified in refusing to grant any further indulgence to the appellant or his advocate. On the contrary, the Learned Judge went out of his way, to accommodate the escapades of the appellant's counsel Miss Kamango. We have already set out the sequence events leading up to the Learned Judge's refusal to vary the orders of 16 December 1996. The Learned Judge's patience was obviously exhausted and correctly so. We cannot fault the Learned Judge on that issue at all and we reject the first three grounds of appeal and we must express our disgust towards the attitude of counsel having the conduct of the defence of the appellant. The appellant chose his counsel then and must bear the consequences.

Eventually the hearing of the OS in the superior court revolved around four properties afore-mentioned. Claims in respect of movable properties referred to in what was described as schedule 'S' were abandoned by the respondent. She also abandoned the claim to her alleged share in a motor vehicle registration number KPZ 722. The four properties in question were described in the OS as:

1. "Property Registration number LR Nairobi/Block 32/36, situate in the Golf Course Estate in Nairobi admittedly jointly owned by the spouses, that is the appellant and the respondent.
2. Property Registration number Ngong/Ngong/3821 admittedly jointly owned by the spouses.
3. Property known as Ngong/Ole Kesasi/35 which in reality turned out to be Ngong/Ole Kesasi/37.
4. Property known as LR number 1160/211."

The third of the above mentioned properties was registered in the name of the appellant on 16 May 1983. According to the title document the appellant acquired the same from one Joseph Karimi Mbiriri for a consideration of KShs 80 000 and on the same day sold it to Pentecostal Evangelistic Fellowship of Africa for a sum of KShs 140 000 which church is the present registered proprietor of the said property.

The fourth of the above mentioned properties was acquired by the appellant, according to entry number 9 on the certificate of title, for KShs 840 000 on 12 July 1983 and on the same day he charged the same to British American Insurance Company (Kenya) Limited for securing a loan of KShs 651 498. On 13 March 1990 the appellant created a further charge in favour of the said insurance company for a further loan of KShs 600 000.

It is common ground that the appellant and the respondent cohabited together as husband and wife from 25 May 1974 until 1981. They were married at St Andrew's Church, Nairobi. The couple was blessed with three children (all boys) namely Hilary Mwangi, born on 14 January 1975, Duncan Nduracha born on 28 December 1978 and Peter Macharia, born on 1 March 1980. After cessation of cohabitation in 1981, the respondent filed for divorce on 1 March 1982 and *decree nisi* of divorce was granted on 23 September 1983. The decree had not been absolute by the time the OS was filed on 14 October 1983.

We come to the format of the OS proceedings lodged by the respondent. As pointed out earlier by us, the OS fails to show under what provision of the law or procedure the same was brought. It can be seen however that it was based on section 17 of the Married Women's Property Act of 1882 of England (the Act). Reliance was also placed on the application of the presumption of resulting trust and the presumption of advancement to transactions between husband and wife.

When a property is acquired during the course of coverture and is registered in the joint names of both the spouses the Court in normal circumstances must take it that such property, being a family asset, is acquired in equal shares. We do not see any error, therefore, on the part of the Learned Judge when he decided that the properties so owned were held in equal shares. As to whether or not the Learned Judge was right in ordering sale of those two properties is an issue we will refer to when we look into the power of the Court in dealing with an application under section 17 of the Act.

The Learned Judge decreed that the property registered as Ngong/Ole Kesasi/35 registered in the name of the Pentecostal Evangelistic Fellowship of Africa had been the joint property of the respondent and the appellant and that the respondent was entitled to a half share of the proceeds thereof which half share was to be paid to her forthwith. The evidence in regard to this property as brought up by the respondent was contained in the affidavit sworn by her in support of her OS as well as in her oral evidence. She said that she had contributed directly or indirectly to the purchase of all the properties in question; that land parcel Number Ngong/Ole Kesasi/35 was purchased from Joseph Karimi Mbiriri at a sum of KShs 75 000 which sum was part of a further loan of KShs 130 000 obtained as a result of creation of a charge on property known as LR Nairobi/Block 32/26 in Golf Course Estate. In her oral evidence she said:

“Out of the loan of KShs 130 000 I paid KShs 60 000 towards the purchase of parcel number Ngong/Ole Kesasi/3821 as part payment. This property is referred in paragraph 2 of the originating summons ...

The balance of the loan of KShs 130 000, for example KShs 70 000 paid for the purchase of parcel of land known as Ngong/Ole Kesasi/35. This property was sold to us by one Joseph Karimi Mbiriri at KShs 80 000 measuring 5 acres. The respondent (appellant here) undertook, at my request, to be responsible to effect transfer of this property. In 1983 this property was registered in the respondent's name...

However, it has been sold off to Pentecostal Evangelistic Fellowship of Africa for KShs 140 000 and title issued on 16 May 1983. This parcel was sold by the respondent without my consent. In fact, I had placed a caution but it must have been removed before the sale.

The respondent has not paid me any money for the proceeds of this sale. I want this Court to take this fact into account when determining the dispute before court.”

This evidence falls short of proof, on a balance of probabilities, that the appellant used the said sum of KShs 70 000, the balance of the loan taken on plot LR number Nairobi/Block 32/26, for purchase of Ngong/Ole Kesasi/35. It is in fact evidence of the nature which does not connect the 32/76 property loan to the purchase of Ngong/Ole Kesasi/35. We are of the view that the Learned Judge erred in finding that the respondent contributed substantially to the purchase of properties so claimed. We are, here, referring in particular to Ngong/Ole

Kesasi/35 property. It is difficult to connect the sum of KShs 70 000 to the purchase of Ngong/Ole Kesasi/35 property. There is a clear gap of many years between the period the second loan on Nairobi/Block 32/26 was raised and the Ngong/Ole Kesasi/35 property was acquired. The fact remains that this particular property was not acquired during the period coverture. There is no evidence as to when the 130,000/- loan was obtained so as to leave KShs 70 000 available for purchase of property in 1983. The evidence of the respondent, though not challenged, is too tenuous to make a finding of presumption of advancement or presumption of resulting trust in favour of the respondent. In the case of *Marie Ayoub and others v Standard Bank of South Africa Ltd and another* [1961] EA 743 Newbold JA said in his dissenting opinion at page 765:

“The courts will not imply a trust save in order to give effect to the intention of the parties. As was said by Lindley LJ in *Standing v Bowring* (11) [1886], 31 ChD 282, at page 289:

“Trusts are neither created nor implied by law to defeat the intentions of donors or settlers; they are created or implied or held to result in favour of donors or settlers in order to carry out and give effect to their true intentions, express or implied.”

Although the judgment of Newbold JA was the dissenting one, it was approved and upheld by the Privy Council on an appeal to it from the then Court of Appeal for Eastern Africa. See *Marie Ayoub and others v Standard Bank of South Africa Ltd and another* [1963] EA 619.

There is no evidence in our view, of any implied or resulting trust in favour of the respondent so as to enable the Court to say that she was a co-owner of the Ngong/Ole Kesasi/35 property. There is another matter which we must point out. The property in question is Ngong/Ole Kesasi/37 and not 35 and no attempt was made at any stage to seek any amendment to the O.S. to reflect this position.

As regards property known as number TR 19040, that is LR number 1160/211 (the Karen property) the respondent said that the appellant purchased the same from the proceeds of the sale of Ngong/Ole Kesasi/35 property and that therefore she was entitled to claim one half of the share of that property. Two matters arise here. If all the proceeds of the sale of Ngong/Ole Kesasi/35 (Or 37) were used to purchase the Karen property, the respondent cannot have claim to both the properties, that is to say, half the profits of Ngong/Ole Kesasi/37 property and half of the Karen property. The Learned Judge granted her both such reliefs. That was a clear misdirection. However, in the end result, nothing will turn on that misdirection.

There was no cogent evidence, acceptable on the standards applicable in civil matters, that is on a balance of probability, that the Karen property was acquired from joint resources of the appellant and the respondent. The certificate of title in regard to the Karen property produced in the superior court shows as pointed out earlier in this Judgment, in entry number 9 that this property was transferred to the

appellant for a consideration of KShs 840 000 on 12 July 1983 by one Dighton William Abercromby and on the same day this property was charged to British American Insurance Company Limited to secure a loan of KShs 651 498. That is entry number 10. Entry number 11 shows that Mr Abercromby lodged a caveat against the title claiming chargee's interest pursuant to clause number 1 of the special conditions contained in an agreement attached to the caveat. This caveat was withdrawn on 5 February 1990. The purchase of the Karen property some two years after cessation of the coverture has not been shown to relate to any monies in reality contribution by the respondent. The evidence adduced by the respondent to bring this property within the ambit of section 17 of the Act or any implied or resulting trust is too tenuous to enable a court to say that the appellant was holding half a share thereof, or any share thereof, in trust for the respondent.

The Learned Judge, on the evidence before him, erred in arriving at the conclusions he did arrive at in regard to Ngong/Ole Kesasi/37 property and the Karen property.

The issue that falls for consideration next is whether or not section 17 of the Act can be used to pass proprietary interests from one spouse to another. This section came under close scrutiny in the House of Lords in England in the case of *Pettit v Pettit* [1969] 2 All ER 385. Lord Reid said of and concerning this section at page 388:

"I would approach the question this way. The meaning of the section cannot have altered since it was passed in 1882. At that time the certainty and security of rights of property were still generally regarded as of paramount importance and I find it incredible that any Parliament of that era could have intended to put husband's property at the hazard of the unfettered discretion of a Judge (including a country court Judge) if the wife raised a dispute about it. Moreover this discretion if it exists, can only be exercised in proceedings under section 17: the same dispute could arise in other forms of action: and I find it even more incredible that it could have been intended that such a discretion should be given to a Judge in summary proceedings but denied to the Judge of ordinary character. It is perfectly possible to construe the words s having a much more restricted meaning and in my judgment they should be so construed. I do not think a Judge has any more right to disregard property rights in section 17 proceedings than he has in other form of proceedings."

Lord Morris of Borth-Y-Gest in the *Pettit* case at said page 398 F:

"But when an application is made under section 17 there is no power in the Court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the Court thinks what the parties could have agreed had they discussed the possible bread-down or ending of relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated. In my view, these powers are not given by section 17."

Lord Hodson in the same *Pettit* case said at page 401 A:

“The matter has now been again fully argued and the same authorities, considered together with the relevant statutes which preceded the Act of 1882, and I would only say that I adhere to the opinions expressed in the *National Provincial Bank* case [1965] 2 All ER 472 in effect re-affirming the language of Romer LJ in *Cobb v Cobb* when he said:

“I know of no power that the Court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material, but where as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the Court cannot in my opinion under section 17 vary those rights merely because it thinks that in the light of subsequent events, the original agreement was unfair.”

Lord Upjohn in the *Pettit* case said at page 405 F:

“In my view, section 17 is purely procedural section which confers on the Judge in relation to questions of title no greater discretion than he would have in proceedings begun in any Division of the High Court or in the country court in relation to the property in dispute, for it must be remembered that apart altogether from section 17, husband and wife could sue one another even before the Act of 1882 over questions of property; so that, in my opinion, section 17 now disappears from the scheme and the rights of the parties must be Judged on the general principles applicable in any Court of law when considering questions of title to property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those who are not so related, whilst making full allowances in view of that relationship.”

Lord Diplock in the *Pettit* case said at page 411 G:

“I agree with your Lordship that the section confers no such powers on the Court. It is, in my view, a procedural section. It provides a summary and relatively informal forum which can sit in private for the resolution of disputes between the husband and wife as to the title to or possession of any property not limited to “family assets” as I have defined them. It is available while husband and wife are living together as well as when the marriage has broken up. The power conferred on the Judge to “make such order with respect to property in dispute ... as he shall think fit” gives him a wide discretion as to the enforcement of the proprietary or possessory rights of the spouse in any property against the other but confers on him no jurisdiction to transfer any proprietary interest in property.”

The reason why we have referred to relevant portions of the speeches of all the five law Lords in the *Pettit* case is that we wish to make our view clearer that section 17 of the Act does not give power to the Court to substitute title from one spouse to the other or to give a portion of the property to one of the spouses. That would have meant that the Court can effectively change the title of the property from one name to another when section 17 does not cater for that drastic innovation.

But we are not alone in this as Gicheru JA in the case of *Kimani v Njoroge* [1997] LLR 553 (CAK) said this:

“The rejoinder of counsel for the respondent (husband) to the submission of counsel for the appellant (wife) was that the appellant’s right to a share of the properties in question was in the realm of constructive trust in respect of which there was no evidence. It was for the appellant to prove on a balance of probabilities that she directly or indirectly contributed towards acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to indirect contribution, the same was invariably to be considered in its own special circumstances. That onus of proof the appellant, from the evidence available before the Learned trial Judge, was unable to discharge. To counsel, therefore, she was not entitled to any share of the properties set out in the Judgment.

The appellant’s claim in the superior court was dependent on evidence of her direct and/or indirect contribution towards the acquisition of the properties listed in the originating summons in that court. Indeed, her counsel said as much in her submission to this Court at the hearing of this appeal. It is only with that kind of evidence that the trial court would have been able to say what its effect in law was for as was observed by Lord Morris of Borth-Y-Gest in *Gissing v Gissing* [1971] AC 888 at page 898 C-D:

‘The court does not decide how the parties might have ordered their affairs: it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstances that harmony has been replaced by discord. Any power in the Court to alter ownership must be found in statutory enactment’.”

Here we must point out the other two Judges of Appeal (Omolo and Lakha JJA) whilst not disagreeing with Gicheru, JA ordered a retrial in the Lower High Court on the basis that the Learned Judge in the superior court (Kuloba J) had shown a patently unfair bias against the wife. But the principle as enunciated in *Gissing v Gissing* (*supra*) was not the subject of dissent.

We would add our own observations, that is, to say that until such time some law is enacted, as indeed it was enacted in England as a result of the decisions in *Pettit v Pettit* and *Gissing v Gissing*, to give proprietary rights to spouses as distinct from registered title rights, section 17 of the Act must be given the same interpretation as the Law Lords did in the said two cases. Such laws should be enacted to cater for conditions and circumstances in Kenya. In England the Matrimonial Homes Act 1967 was enacted which was later replaced by the Matrimonial Proceedings and Property Act 1970. The Matrimonial Cause Act of 1973 also made a difference.

At least what was decided in *Gissing v Gissing* (*supra*) opened a way to seek relevant relief by pleading trusts, express, implied or resultant. Such claim can be brought by way of declaratory suit.

Even if the Learned Judge was correct in his findings to the effect that Ngong/Ole Kesasi/37 property and the Karen property belonged equally to the two spouses he could not, properly have ordered transfer of proprietary interest in the properties from one spouse to another. He could have only ordered that the appellant do pay to the respondent one-half or such appropriate share of the value of each property after a market valuation thereof was carried out by a reputable valuer. As it stands now it is not necessary to make any such order as we have come to the conclusion that the respondent did not prove any entitlement to any share in these two properties.

We come back to the first two properties which are jointly owned. We see no reason to depart from what the Learned Judge found in regard thereto save as to his order for sale of the two properties and proceeds thereof to be divided equally. Before we formulate our orders we must consider that this litigation has been going on between the spouses since 1983. The appellant has had a better measure of control and benefit over these properties and has gained more therefrom than the respondent has. We do not wish to leave any room for doubt. We do not want the parties to litigate over what the two properties have earned since cohabitation ceased. To compensate the respondent for the loss she has suffered as a result we would apportion their shares over the properties so that the respondent gets 60% share of both the said properties and the appellant gets 40% share of both the said properties. We order that both the said properties be valued by an independent valuer to be agreed upon between the appellant and the respondent. In the absence of such an agreement the superior court may nominate such valuer. Upon valuation thereof either party to be at liberty to buy out the share of the other party where after there could be effected, if necessary, transfer of title by ordinary conveyancing methods. We would therefore vary orders 1 and 2 of the Learned Judge in terms as set out above. We would set aside orders 3 and 4 made by the Learned Judge. We would leave the 5th Order undisturbed. We would also amend Order number 6 and give to the wife respondent 60% of the costs of the suit in the superior court instead of full costs.

The appellant had a measure of success in this appeal and we would award to him one-half the costs here. We would make no order as regards costs of the interested party. These are then our orders.

MBUGUA V MBUGUA [2000]

HIGH COURT OF KENYA AT NAIROBI

VISRAM J

Date of Judgment: 14 May 2001

Case Number 1489/97

SOURCED BY: LAWAFRICA

CITATION: [1997] LLR 1685 (HCK)

Importance

Decided just two months after *Kamore*, this case interprets and applies the newly rediscovered principles of trust law. The court also shows an implicit recognition of the ability of the spouses to maintain separate property during the pendency of their marriage. Further, following Kuloba's reasoning in *Kimani*, the Court held that the wife's claim to indirect contribution simply for fulfilling the moral duty of every mother by looking after the children had not been proved.

The decision correctly distinguishes between jointly held properties and properties held by one spouse absolutely. This decision is also important for dealing with the question of whether company shares can be the subject of a section 17 application. However, the Court was unclear about whether such shares would be considered in the application. While the Court stated that shares, like any other property, could be subject matter in the application, the Court refused to consider the wife's claim to a beneficial interest in the husband's share on the basis that a dispute as to the family company's management would be resolved under the Companies Act.

[1] Family Law – Property of spouses – Direct contribution – Wife managing family business – Proceeds from family business used to acquire property – Property in husband's name – How to determine wife's share of property – Joint bank account – Proportion of ownership – Indirect contribution – Wife had left home without notice on previous occasions – Whether property was acquired through joint efforts of both parties – Whether trust can be implied in the circumstances – Section 17 Married Women's Property Act.

[2] Family Law – Property of spouses – Company shares – Whether court has jurisdiction under section 17 MWPA to deal with question of beneficial interest in company shares.

Editor's Summary

The applicant was married to the respondent in September 1981 and bore him six daughters. At the time of their marriage, they were both in salaried employment and neither had any capital property. In 1996 the appellant left the matrimonial home and separated from her husband. Her husband had in his possession several properties

including six pieces of land, various motor vehicles, shares in two companies and household goods.

The applicant claimed to be entitled to an equal share in the aforesaid properties on the ground that the same were acquired through the joint efforts of both parties. In support of her claim for direct contribution, she stated that she resigned from her job and run the family business, Wachuchu Enterprises, from 1989 onwards. Some of the properties were purchased from the proceeds of Wachuchu Enterprises but they were in the sole possession of the respondent. Wachuchu Enterprises was a registered company and both parties were shareholders. The applicant therefore sought a declaration on the proportion of ownership in Wachuchu Enterprises taking into account here active involvement in its affairs, and in another company wherein the husband held shares.

In support of her claim for indirect contribution, the applicant stated that she paid for household expenses of the family while her husband paid for rent and other outgoings. However, it was common ground that the marriage was stormy from the beginning. This situation was partly caused by disputes over money. The applicants had not really pooled their resources effectively together. Evidence was led to show that the applicant had abandoned the family on certain occasions without information, and that she travelled once to London and withdrew a large sum from the couple's joint bank account.

The husband contested the claim of the wife for an interest in any of his property. He denied any direct or indirect contribution from her. The wife was an emotional strain on the marriage. She was often absent from home, and a house-help had to be employed to assist with the children. The husband added that he had even gone out of his way to purchase a property for his wife, which was in her possession.

The issue for determination was whether the applicant was entitled to any share in the aforesaid properties, and if so to what extent. The court also considered whether title to company shares could be dealt with in a section 17 application.

Held:

1. To succeed under a section 17 application, the applicant must show that she contributed directly or indirectly to the acquisition of the properties claimed. The fact that the property was acquired during coverture is not, of itself, sufficient to entitle the claimant to a share in it. *Kimani v Njoroge* [1997] LLR 553 (CAK) (partial dissent of Gicheru, JA) approved; *Kamore v Kamore* [1998] LLR 714 (CAK) followed.
2. Regarding the immovable acquired solely from the husband's finances, the wife had failed to show any contribution to their acquisition. Considering that she had no

knowledge of building construction, the fact of her site visits during construction of one of the properties would not by itself entitle her to any share therein.

3. Since the family business was owned by a limited company of which the parties were shareholders and directors, each of the parties was entitled to his/her shareholding in that company. Any dispute as to the company's management should be resolved under the Companies Act. The court would therefore not entertain the applicant's contention that the husband altered the shareholding without consulting her.
4. Property acquired from the company and registered in the husband's name or in his possession should be shared in the proportion of the spouses' shareholding. The fact that the wife worked for the company would not by itself imply an enhancement of her shareholding therein.
5. The parties were entitled to an equal share of the money held in joint bank accounts. The fact that the husband intended the money to be used for the benefit of the children does not change the title of the spouses to the same.
6. The wife's claim for indirect contribution would not stand. She had been equally absent from home and had not pumped much into the family coffers by her absence. Though she looked after the children, this is a moral duty incumbent upon every mother. She did not show any special input, considering that her husband had also spent time with the children, to justify her claim for any beneficial interest in her husband's property. *Gatimu v Gatimu* Nairobi High Court civil case 1137/1999 distinguished.

Per curiam:

- (i) On the exercise by the Court of powers under section 17 of the Act:
 - (a) the court has no power to transfer title from one spouse to the other *Pettit v Pettit* [1969] 2 All ER 365 approved, *Kamore supra* followed, *Midland Bank plc v Cooke and another* [1995] 4 All ER 562 distinguished;
 - (b) where both spouses contributed to the property but there was no understanding about sharing the beneficial interest therein and the spouse with title evinced no intention that the contributing spouse should share the same, the question of whether the contributing spouse is entitled to a beneficial interest is dependent on the law of trust. *Gissing v Gissing* [1971] AC 888 approved;
 - (c) there is no distinction to be drawn between direct and indirect contributions, except that in the latter case the relevant share in the beneficial interest is likely to be less easy to evaluate;

- (d) a trial Judge under a section 17 application should take into account the wife's back up service on the domestic front in determining her beneficial interest in the property acquired during coverture. *Nderitu v Nderitu* [1997] LLR 2731 (CAK) followed;
 - (e) even where the wife had made measurable financial contributions to the family income and property, the Court should also consider her substantial indirect contribution in paying for household expenses, food and clothing, schooling of the children and enhancing the family welfare *Kivuitu v Kivuitu* [1991] 2 KAR followed;
 - (f) where a precise estimate of the wife's share is difficult, a rough estimate should be made, which does not mean presuming equality of contribution. *Gissing supra* approved
- (ii) Company shares can be dealt with under a section 17 application regardless of whether only one or both parties are shareholders therein. *Mungai v Mungai* [1995] LLR 405 (CAK) distinguished; *Mereka v Mereka* Nairobi High Court civil case 32/1986 approved (Principle not followed).

Assessment:

Justice Visram makes a gallant attempt to reconcile the various divergent ratio of the Court of Appeal. Two decision from the 'family assets' tradition, *Kivuitu* and *Nderitu*, form part of the judgment. There are also two decisions from the *Pettit-Gissing* tradition: the partial dissent in *Kimani* and the decision in *Kamore*.

The court brings in a new consideration to dilute the principle that every wife by doing her wifely duties acquires an interest in the husband's property. The wife in this case had looked after the children of the marriage. As is common in many urban families where both spouses are in employment, there had also been an arrangement by which the wife would take care of household expenses while the husband paid rent and other outgoings. The court reflected that the performance by the wife of her motherly and wifely duties did not by itself entitle her to acquire a beneficial interest in her husband's property. The court was of the view that the wife should show a special input to justify her claim for indirect contribution.

While this decision may be applauded for its brave confrontation of previous decision of our local courts, the continued clinging to considerations of each spouse's performance of marriage obligations as a criterion to distribute property leaves a lot to be desired it signifies an inability to properly distinguish an application under the Married Women's Property Act for determination of title to property and a

matrimonial cause for transfer of title from one spouse to another. The latter action would have to be based on specific principles provided in legislation by Parliament.

In the UK for example, section 25 of the Matrimonial Causes Act of 1973 was enacted as a direct response to the decision in *Gissing*. It provides that a court may consider various principles, such as the interests of minor children of the marriage and the means and needs of the spouses. In determining how to distribute property during a divorce cause.

Cases referred to in judgment

East Africa

Gatimu v Gatimu Nairobi High Court civil case number 1137 of 1999

Kimani v Njoroge [1997] LLR 553 (CAK)

Kivuitu v Kivuitu (1991) 2 KAR

Mereka v Mereka Nairobi (Milimani) High Court civil case number 32 of 1986

Mungai v Mungai [1995] LLR 405 (CAK)

Nderitu v Kariuki [1997] LLR 2731 (CAK)

Kamore v Kamore and another [1998] LLR 714 (CAK)

United Kingdom

Gissing v Gissing [1971] AC 888

Midland Bank plc v Cooke and another (1995) 4 All ER 562

National Provincial Bank (1965) 2 All ER 4721

Pettit v Pettit (1969) 2 All ER 385

Judgment

This originating summons is brought under section 17 of the Married Women's Property Act (1882) (hereinafter referred to as "the Act") by Mrs Agnes Wanjiku Mbugua (hereinafter referred to as "the applicant") against her husband Mr James Mbugua Macharia (hereinafter referred to as "the respondent"). The applicant seeks, amongst other orders, a declaration that a number of named properties, both movable and immovable, acquired by the joint efforts and funds of both parties during their marriage and presently in the possession of the respondent are jointly, owned by the applicant and the respondent.

The parties were married on 5 September 1981. They were blessed with 6 children, all daughters. (...) All these children are now living with the respondent. They are all in school and their education expenses are being met by the respondent. There is no doubt that he is also responsible for their daily upkeep.

At the time of the marriage, the applicant was employed as a secretary at Printing and Packaging Corporation Limited at a salary of KShs 2 800 per month and the respondent was an Engineer at the Nairobi City Council at a salary of KShs 4 445 per month. At that time, none of them had any capital property. They started their married life in a rented house at Kariobangi South, Nairobi. They separated in 1996, and although the marriage is still in existence, there is pending in the Court of Appeal an action for judicial separation.

During the course of the marriage, several properties were acquired. The properties, including 6 land holdings, 7 motor vehicles, shares in 2 companies, one Wachuchu Enterprises being co-owned by both parties and various household goods, were then listed.

Apart from Plot 930, Plains view, all the other properties are in the possession of the respondent. The applicant is in possession of Plot No. 930 Plains view by virtue of a court maintenance order. That aside, it was not disputed that the respondent bought LR number 26 Komorock South for the applicant.

In her Affidavit, the applicant included Plot number 188 of Kiambu Road and another unknown Plot at South C but there was no evidence to show that these two properties belonged to the respondent. Apart from the properties already mentioned, the parties also operated two joint accounts with Barclays Bank PLC in London, Britain. Those accounts were opened by the respondent in 1988 in his name. The applicant was later made a signatory to them in 1991.

The applicant was employed since the date of the marriage until 1989 when she resigned to run a family business. That business was a supermarket owned by Wachuchu Enterprises of which the parties were shareholders.

Although the marriage between the parties was graced with six children, it cannot be described as having been a comfortable one. In the applicant's own words, the relationship was "stormy from the beginning." The respondent, on the other hand, said that it was "no marriage at all." The applicant's parents did not support that marriage. They looked down upon the respondent as a poor man. In December 1981, barely three months after the marriage, the applicant's parents took her away from the matrimonial home. In September 1982, the applicant left the matrimonial home without informing the respondent. Finally she left the matrimonial home in 1996 to an undisclosed destination without informing her family. It was later found out that she was in London.

The applicant claims to be entitled to an equal share in the matrimonial properties on the ground that the same were acquired through the joint efforts of the parties. The

respondent, on the other hand, denied the applicant's contribution to the purchase or acquisition of the properties registered in his name and the matrimonial property as a whole. He stated that those properties were bought from his own personal resources. He also stated that the applicant had not contributed in any way to the London Bank Accounts mentioned earlier.

The issue for determination in this case is whether the applicant is entitled to a share in the matrimonial properties mentioned earlier and if so, to what extent.

Section 17 of the Act provides as follows:

"In any question between husband and wife as to the title to or possession of property, either party ... may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice ... and the Judge ... may make such order with respect to the property in dispute ... as he thinks fit ..."

The provisions of this section gives the Court power, in a proper case, to make such orders as it deems fit where there arises any question between the husband and wife as to the title to or possession of matrimonial property.

In order to succeed on an application under section 17 of the Act it is incumbent upon the applicant to show that she contributed directly or indirectly to the acquisition of the properties claimed. The fact that the property was acquired during coverture is not, of itself sufficient to entitle the claimant to a share in it. On this point Gicheru, JA, said as follows in *Kimani v Njoroge* [1997] LLR 553 (CAK) (Himself Omolo and Lakha JJA) (cited in *Njomo v Kamore and another* [1998] LLR 714 (CAK) Tunoi, Shah and Bosire JJA:

"It was for the appellant to prove on a balance of probabilities that she directly or indirectly contributed towards acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to indirect contribution, the same was invariably to be considered in its own medical circumstances. That onus of proof the appellant, from the evidence available before the Learned trial Judge, was unable to discharge. To counsel, therefore, she was not entitled to any share of the properties set out in the judgment. [T]he appellant's claim in the superior court was dependent on evidence of her direct and/or indirect contribution towards the acquisition of the properties listed in the originating summons in that court ... It is only with that kind of evidence that the trial court would have been able to say what its effect in law way for as was observed by Lord Morris of Borth-Y-Gest in *Gissing v Gissing* [1971] AC 888 at page 898 C - D:

"The Court does not decide how the parties might have ordered their affairs: it only finds how they did. The Court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of

property be affected by the mere circumstances that harmony had been replaced by discord. Any power in the Court to alter ownership must be found in statutory enactment”

Although section 17 of the Act gives the Court wide powers in these matters, there are now established certain principles upon which that power may be exercised. I will discuss those principles briefly as follows.

To begin with, section 17 of the Act does not in any way give the Court power to substitute title from one spouse to the other or to give a portion of the title to one of the spouses. If it were otherwise, it would mean that the Court could effectively change the title of the property from one of the spouse to another contrary to the intention of section 17 of the Act. That section does not cater for such drastic invocation. The Court of Appeal sounded this position clearly in the famous *Kamore* case *supra*. In that case, the Court quoted with approval the following statements by the Learned Law Lords in the House of Lords in the case of *Pettit v Pettit* (1969) 2 All ER 385:

“I would approach the question this way. The meaning of the section cannot have altered since it was passed in 1882. At that time, the certainty and security of rights of property were still generally regarded as of paramount importance and I find it incredible that any Parliament of that era could have intended to put husband’s property at the hazard of the unfettered discretion of a Judge (including a county (sic) court Judge) if the wife raised a dispute about it. Moreover, this discretion if it exists, can only be exercised in proceedings under section 17 (of the Act); the same dispute could arrive in other forms of action; and I find it even more incredible that it could have been intended that such a discretion should be given to a Judge in summary proceedings but denied to the Judge of ordinary character. It is perfectly possible to construe the words as having a much more restricted meaning and in my judgment they should be so construed. I do not think a Judge has any more right to disregard property rights in s.17 proceedings than he has in other form of proceedings (per Lord Reid at page 388).

But when an application is made under section 17 there is no power in the Court to make a contract for the parties which they have not themselves made, Nor is there power to decide what the Court thinks what the parties could have agreed had they discussed the possible break-down or ending of relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated. In my view, these powers are not given by section 17 (per Lord Morris of Borth-Y-Gest at page 398 F)

The matter has now been again fully argued and the same authorities, considered together with the relevant statutes which preceded the Act of 1882 and I would only say that I adhere

to the opinions expressed in the *National Provincial Bank* case (1965) 2 All ER 4721 in effect re-affirming the language of Romer LJ in *Cobb v Cobb* when he said:

I know of no power that the Court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material, but where as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the Court cannot in my opinion under section 17 vary those rights merely because it thinks that in the light of subsequent events the original agreement was unfair. (Per Lord Hodson at page 401A)”

In my view, section 17 is purely procedural section which confers on the Judge in relation to questions of the title no greater discretion than (sic) he should have in proceedings begun in any Division of the High Court or in the county court in relation to the property in dispute, for it must be remembered that apart altogether from section 17, husband and wife could sue one another even before the Act of 1882 over questions of property; so that in my opinion, section 17 now disappears from the scheme and the rights of the parties must be judged on the general principles applicable in a Court of law when considering the questions of title to property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those who are not so related whilst making full allowances in view of that relationship. (Per Lord Upjohn at page 405F)”

I agree with your Lordships that the section confers no such powers on the Court. It is, in my view, a procedural section. It provides a summary and relatively informal forum which can sit in private for the resolution of disputes between the husband and wife as to the title to or possession of any property not limited to family assets as I have defined them. It is available while husband and wife are living together as well as when the marriage has broken up. The power conferred on the Judge to “make such order with respect to property in dispute ... as he shall think fit gives him a wide discretion as to the enforcement of the proprietary or possessory rights of the spouse in any properly against the other but confers on him no jurisdiction to transfer any proprietary interest in property. (Per Lord Diplock at page 411G) “

The Court which decided the *Kimani v Njoroge* case also followed the *Pettit* case. Although the law in England has been changed so that *Pettit* case *supra* is no longer good law there, the Learned Judges of Appeal in the *Kamore* case stated, without doubt that *Pettit* case and *Gissing* case were good law in Kenya. The change in England was brought about by statutory enactments which has not happened in Kenya yet. For this reason, the case of *Midland Bank plc v Cooke and another* [1995] 4 All ER 562 relied on by the applicant is irrelevant as it is not applicable in this country. That decision was

decided in light with English statutory changes which rendered *Pettit* case bad law in England. That is not the case in Kenya.

The *Gissing* case opened the way to seek relevant relief under section 17 of the Act by pleading trusts: express, implied or resultant. This had not been appreciated at the time of *Pettit* case. The facts in *Gissing* case were as follows:

The parties were married in 1935. In 1951, the matrimonial home was purchased for £2 695 and conveyed into the sole name of the appellant. The purchase price was raised as to £2 150 on mortgage repayable by installments, as to £500 by a loan to the appellant by his employers, and the balance of £45 and the legal charges were paid by the appellant from his own money. At no time was there any express agreements to how the beneficial interest in the matrimonial home should be held. The respondent (who was earning £500 per annum) made no direct contribution to the initial deposit or legal charges, nor to the repayment of the loan of £500 nor to the mortgage installments. The respondent provided some furniture and equipment for the house and for improving the lawn and in all spent £220 on this. The respondent also paid for her and her son's clothes and some extras. It was not suggested that either the respondent's efforts or earnings made it possible for the appellant to raise the £500 loan or the mortgage. Nor was it suggested that the purchase of the respondent's clothes, or her son's was undertaken to assist the appellant in meeting the repayment of the loan or the payment of the mortgage installments which he undertook. The appellant also paid the outgoings on the house and gave to the respondent a housekeeping allowance, and he paid for the holidays. In 1961, the marriage broke down and, in 1966 the respondent obtained a decree absolute. On the question whether the respondent had any beneficial interest in the former matrimonial home, the House of Lords held that on the facts it was not possible to draw an inference that there was any common intention that the respondent should have any beneficial interest in the matrimonial home. In summary, the *Gissing* court stated that where:

- (a) both spouses contributed towards the purchase of matrimonial property, which was conveyed into the name of one spouse only; and
- (b) there was no discussion, agreement or understanding between the spouses as to the sharing of beneficial interest in the matrimonial property; and
- (c) the spouse in whose name the matrimonial property was purchased evinced no intention that the contributing spouse should have a beneficial interest therein, the question whether the contributing spouse is entitled to a beneficial interest in the matrimonial property is a matter dependant on the law of trust.

Lord Reid said as follows in *Gissing* case (*supra*) at page 792:

“If there has been no discussion and agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him?”

In these matters, there is no distinction to be drawn between the position where a contributing spouse makes direct contributions towards the purchase of the matrimonial property and where the contributing spouse makes indirect contributions, although in the latter case the relevant share in the beneficial interest is likely to be less easy, to evaluate. On this question Lord Pearson said as follows at page 788 of the *Gissing* case (*supra*):

“Contributions are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance there can be a contribution if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments.”

The case which present problems and the common ones in our country, are where the other spouse made an indirect contribution to the acquisition of the matrimonial property. That contribution has been recognized by our courts very well. In *Nderitu v Kariuki* [1997] LLR 2731 (CAK) (Kwach, Shah and Pall JJA), Kwach JA said as follows on the question:

“A wife’s contribution, and more particularly a Kenyan African wife, will more often than not take the form of back up service on the domestic front rather than a direct financial contribution. It is incumbent, therefore, upon a trial Judge hearing an application under section 17 of the Act to take into account this form of contribution in determining the wife’s interest in the assets under consideration.”

In *Kivuitu v Kivuitu* [1988-1992] 2 KAR the Court of Appeal held that although the wife had made measurable financial contributions to the family income and to the acquisition of the matrimonial property, that was too narrow a basis on which to determine the parties respective shares in the matrimonial home. The Court of Appeal in that case was of the view that since the wife had made a substantial indirect

contribution to the family income and assets by using her income to pay for household expenses, to prepare food and clothing the children, organizing their schooling and generally enhancing the welfare of the family, she was entitled to a share in the matrimonial home registered in the name of her husband. Where it is claimed that the other spouse made an indirect contribution, the fact that there is a difficulty in evaluating the relevant share does not of itself justify the application of the maxim “equality is equity” where the fair estimate of the intended share may be some fraction other than one-half. On this question Lord Reid said as follows at pages 782-783:

“It is perfectly true that where she does not make direct payments towards the purchase of it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half share. I think that the high sounding brocard ‘Equality is equity’ has been misused. There will be many cases where half share is a reasonable estimation, but there will be many cases where a fair estimate might be a tenth or a quarter or sometimes even more than a half.”

In determining the share, one of the considerations to look at is the benefit gained by the party in possession of the matrimonial property during the period of exclusive possession as did the Court in the *Kamore* case.

It must be remembered that an application under section 17 of the Act deals with the property held by the husband and not that of third parties. Such an application cannot, therefore, cover property owned by a limited liability company which is a separate entity. That is perfectly clear. At this point it is opportune to ask whether an application under section 17 of the Act can cover shares of a party held in a limited liability company. The respondent’s Advocates argued that that cannot be the case. In this regard, they relied on the case of *Mungai v Mungai* [1995] LLR 405 (CAK) (Kwach, Tunoi and Shah). In that case the appellant had filed a petition for divorce and an originating summons under section 17 of the Act against her husband, the respondent. Both suits were pending when she filed two petitions in this court seeking, in each case, an order for the winding up of two companies Magana Holdings Ltd and Muni Limited. The appellant held one share in Muni Ltd while the respondent held 399 shares. Muni Limited was the majority shareholder in Magana Ltd. The trial Judge (Ole Keiwua J (as he then was)) struck out the two winding up petitions on the grounds that they did not show any cause of action and were an abuse of the process of the Court. He said that:-

“In view of the existence of an application under section 17 of the Married Women Property Act to declare the petitioner’s rights to property, these petitions may be viewed as brought to embarrass and pressurize the respondents (*sic*). Although I have not seen that application, may

be one of the orders would include declarations as to the extent of the petitioner's rights in the companies in view of her statement in paragraph 6 of the petition that she assisted in the raising of the monies used to buy these companies."

The Court of Appeal reversed this decision saying that the jurisdiction under the Act and the Companies Act (Chapter 486) were separate and independent of each other, Kwach, JA said as follows:

"The Application under section 17 of (the Act) could only deal with property held by the respondent as a husband. *It could not cover shares held by the respondent in a Ltd company in which the wife also held shares in her own right* [Emphasis mine]

Shah JA said as follows:

"It would in my view be wrong to infer, merely because a section 17 application under (the Act) was pending between the parties who are co-shareholders in a company, that the winding up petition was an abuse of the process of court. The law gives rights to seek such remedies as the parties may be entitled to. If different Acts of Parliament give rights to parties to ventilate their grievances in court, then the law must take its course, subject of course to the Court being able to say that the defendant/respondent ought not to be vexed again in a matter pending earlier in another court. In the instant case there was no evidence before the Learned Judge that the issue of the appellant's entitlement under the Act of 1882 was in any manner intertwined with the issue of winding up of the company. The 1882 Act remedies are of a special nature. Section 77 of the 1882 Act being a procedural section merely declares the rights of a married woman to properties jointly held by spouses or by the husband. That Act cannot decide anything that a Company Court exercising its independent and separate jurisdiction under the Companies Act (Chapter 486) can decide. The two jurisdictions are totally independent of each. The wife's rights under section 17 of (the Act of) are separate and distinct from her rights as a shareholder/director of a company. The companies court will not make decisions (and cannot do so) as to property rights of the appellant and the matrimonial court cannot make decisions declaring the appellant's rights as a director/shareholder of a company. Even if there may be some overlap eventually that can be no ground for saying that section 17 of the Act of 1882 application overtakes the winding -up petition."

The reason I have produced the Judgments of Kwach and Shah JJA is as follows: The question whether shares in a company can be a subject of an application under Section 17 of the Act was not directly in issue in the *Mungai* case. However, the two Judgments shed some light to the respondent's contention on the question. In my view, the *Mungai* case does not in any way support the proposition that shares owned in a limited liability company cannot be subject of an application under section 17 of the Act. There is no doubt that the respondent relied on the statement by Kwach JA

quoted earlier. It is not clear what the Learned Judge meant to say but that statement does not, to my mind, support the proposition advanced for the respondent. If it does, it would be very hard to justify in view of what follows. Does it then mean that section 17 would cover shares held by a husband in a limited company in which the wife held no shares? In any event, that statement would not cover situations where the wife is not only claiming her shares in a limited liability company in which her husband is also a shareholder but also claiming to be entitled to some of his shares quite apart from company law principles. It may also be asked as follows: If shares are the property of the husband, what would prevent them from being the subject of an application under section 17 of the Act? In my view, shares in a limited liability company are subject to an application under section 17 of the Act notwithstanding the fact as to whether both parties are shareholders in that company or only one of them. In fact, although the decision of this court in the *Mungai* case was reversed by the Court of Appeal, a close reading of it reveals that it supports the proposition that shares in a limited liability company can be made a subject of an application under section 17 of the Act. That aside, the judgment of Shah JA does not in any way say that such a claim cannot be made under section 17 of the Act. In my view, the *Mungai* case only says that proceedings under the Act are distinct and separate from proceedings under the Companies Act. That case, in fact, supports the proposition that a person with causes under both Acts may bring them without hindrance. In my view, shares being the property of a husband, are subject to an application under section 17 of the Act. It is only the property of the company which is not subject to an application under section 17 of the Act for the reason already stated. In saying this, I am not alone. This position was accepted by Ransley (Commissioner of Assize) in *David Mukii Mereka v Margaret Njeri Mereka* Nairobi High Court civil case number 32 of 1986 (Milimani Commercial Courts) when he said as follows:

“There is nothing in that decision (the *Mungai* case supra) which inhibits a court from dealing with the title to shares under ... (the Act)”

That is what he said in his Ruling in an interlocutory application. In his final judgment, he said as follows:

“I do not accept Mrs Odul’s (*sic*) submission that this (shares in a limited liability company) is a matter of company law which can only be dealt with under the provisions of the companies Act. With respect to him a share is property and in proceedings of this kind a court is entitled to make a finding as to who is the true owner of such shares.”

I agree with him fully.

Having discussed the above principles, can it be said that the applicant is entitled to any share in the matrimonial property registered in the respondent's sole name or in his possession?

As has already been seen, the applicant's case is that she made financial contribution and other sacrifices towards the acquisition of the matrimonial property.

In disposing of this application, I will start with the landed property acquired during coverture and registered in the respondent's name. Those properties have been listed earlier.

It is admitted that the Ngei I property was bought through a loan obtained by the respondent from his employer. The applicant also admitted that she made no direct contribution to the acquisition of that property. However, she said that she assisted in the construction of the buildings now erected thereon. At the time this property was acquired, the applicant was employed. She said that she supervised construction of the buildings on it on weekends and when she resigned from her formal employment in 1989. The applicant admitted that she did not have any construction knowledge and one is left wondering what supervision she did. There is no evidence at all that she did this. Even if that were the case, I think that what she did was no more than visiting to see the development her husband was carrying out. The same story was said of Plot 570 Kayole. This was also acquired from funds raised from the respondent's employment. There is no evidence of the applicant's contribution to the acquisition of that property.

The Plot number 930, Plains view was acquired through a mortgage obtained by the respondent from Kenya Re. The applicant stated in her testimony that she had contributed to its deposit but could not, on cross-examination, remember doing so. That mortgage is still being paid for by the respondent despite the fact that this property is in the possession of the applicant. In the circumstances, there is no evidence that the applicant contributed to the acquisition of that property.

As to LR number 1006/10, Nairobi at Dandora, the applicant stated that that property was obtained from the proceeds of the family supermarket which she was managing when she resigned from her employment. This was not controverted in any material by the respondent and I have no doubt that it was acquired as stated.

Kiambaa/Kihara property was bought in 1983 from the respondent's own resources. There is no evidence that the applicant made any direct contribution to the acquisition of that property.

LR number 80/7 (original number 80(4)1) Kiambu was bought in 1990. Although the applicant admitted that she made no direct contribution to the acquisition of this

property, she said that the same was acquired through proceeds from income from coffee and the supermarket which she was running. This testimony was also not successfully challenged by the respondent and I accept that it was so acquired.

As to the motor vehicles, the evidence shows as follows:

- (a) KYE 815 was bought by the respondent from his own resources without any contribution from the applicant;
- (b) KZP 107 was bought by the respondent but he stated that it was owned by Wachuchu Enterprises;
- (c) KWS 070 was bought from the proceeds of the supermarket and was owned by Wachuchu Enterprises, although it has now been sold;
- (d) KAC 126W was bought from the proceeds of the supermarket and, was owned by Wachuchu Enterprises; and
- (e) Although the applicant says that KUZ 321 was bought through the savings of the parties, there is no evidence as to this. This must have been bought by the respondent from his own personal resources.

As to the shares in Machiri construction there is no evidence whatsoever of the applicant's contribution to their acquisition.

Now as to the status of the supermarket it is clear that it was owned by Wachuchu Enterprises of which the parties were shareholders and directors. There can be no doubt that each of the parties is entitled to his/her shareholding in that company. However, any dispute as to the management and running of that company remains a matter to be resolved under Chapter 486. For that reason this court will not entertain the applicant's case that the respondent altered the shareholding without consulting her. That is a matter outside section 17 of the Act. What this court can deal with is only matter outside the question of title or possession of matrimonial property as established to be the property of the parties or one of them. Having said this, it is clear that property which belongs to Wachuchu Enterprises cannot be a subject of this application. It is property owned by a separate entity apart from the parties.

However, it is my view that property acquired from the proceeds of Wachuchu Enterprises and registered in the respondent's name or in his possession, if any, ought to be shared amongst the parties according to their shareholding. There is no evidence that the applicant contributed to the respondent's shareholding in that company. He is entitled to his shares in that company alone. However, as I have said, if there is any dispute as to his shareholding, that is a matter to be resolved under Chapter 496. Although the applicant provided services to the supermarket, there is no evidence that

this enhanced or diminished her shareholding in Wachuchu Enterprises. Her shareholding was not affected by the arrangement to have her manage the supermarket. She was working for Wachuchu Enterprises for all practical purposes and her work there must be looked at as such and not in any other way.

As regards the London Bank Accounts, the same are in the names of the parties and, without more, I declare that the parties are entitled to an equal share of the funds therein. Although the respondent wanted this court to believe that he had intended the money in those accounts to be used for the benefit of the children and although it is also clear that he opened those accounts alone and only brought the applicant to be a co-signatory later, the fact that they were jointly owned is sufficient to make this court order that she is entitled to half the share of the funds in those accounts. In an application under section 17 of the Act the Court deals with the title of the parties to the matrimonial property and not what plans one party had for some particular property.

As has already been seen, apart from the properties acquired from the proceeds from the supermarket, there is no more evidence that the applicant contributed directly to the acquisition of the properties registered and/or in possession of the respondent. The only other question is whether she contributed indirectly to the acquisition of those properties.

In her testimony, the applicant admitted that her marriage to the respondent was “stormy” from the beginning. Although their accounts were different, there is no doubt that some of their matrimonial disputes were caused by arguments over money. Further although it is also clear that the applicant was in salaried employment from the date of marriage there is no evidence at all of monetary harmony between the parties. It may be, as the, applicant said, that she paid for household expenses while the respondent paid for rent, electricity and other expenses but it is unclear whether the parties ever pooled their resources together as the applicant would want this court to believe. It was her Advocate who brought out the evidence that the applicant’s parents were intent to keep the respondent away from her money. The general evidence does not reveal the applicant as a responsible and co-operative partner. She came out as an extravagant person who could not hesitate to squander her husband’s hard earned wealth. Why, for instance, did she have to go all the way to London to seek legal advice? That aside, the applicant did not convince me how she used the UK £23 000 she withdrew from the London, accounts. She said that she used KShs 600 000 to buy a car and KShs 1 400 000 to start a business which failed. It also appears that the applicant was not only an economic but also an emotional strain to the respondent and their family. Although there is no doubt that she ensured that food was on the table and saw the children to bed, she does not appear as someone who had her family at

heart. She was unreliable and would abandon them without a second thought. It was the respondent's testimony that on the occasions she left the matrimonial home she did so without information and would not care for their welfare while away. For instance, when she left in 1996, she did not inform them where she was and during this time her family was subjected to two violent attacks. She did not care: She was in London trying, no doubt, to scratch together what she could as much she could. It must be remembered that each application under section 17 of the Act must be determined on its own facts as was said by Gicheru JA in the *Kimani v Njoroge* case *supra*. This case is to be distinguished from the case of *Hannah Wanjiku Gatimu v Elkanah M Gatimu* Nairobi High Court civil case number 1137 of 1999 which is a case which was decided by me sometime last year. The applicant in that case was found to be a supportive wife, a hospitable mother and a co-worker who always supported her family. At the time of the hearing of her application, she was still supporting her family. She was paying for the education of one of the children of the marriage who was studying at a university and supporting another who was staying with her (the applicant's) sister. She had accommodated her husband at a house provided by her employer when they started their marriage life. She made substantial contributions to the acquisition of the family property both directly and indirectly. She provided emotional stability to the family when the respondent was barely home. Most of the property in dispute in that case was acquired after the sale of a joint property of the parties. The applicant in that case was a special mother and wife. There is nothing common between her and the applicant in the present case. The applicant in this case was as much away from the home as the respondent which forced them to employ a househelp to assist with the children. However, there is nothing much she pumped into the family coffers with her absence. Even if it is assumed for a moment that she paid for food and clothing, there is no evidence at all that this was done to enable the respondent acquire the property now in dispute. It may also be true that she ensured that food was on the table and looked after the children but in my view this is a moral duty incumbent upon every mother. That was not any special input to make her lay a claim on her husband's property. It was also not disputed that the respondent also spent time with the children by "playing" with them. In general, there is no evidence that the applicant was to have any beneficial interest in the respondent's property.

In conclusion, therefore, I would say that apart from the properties acquired from the proceeds of the supermarket owned by Wachuchu Enterprises, there is no evidence that the applicant made any direct or indirect contribution to the acquisition of the property now registered in the respondent's name or in his possession. I, therefore, make the following findings:

The applicant is not entitled to any of the, properties claimed in her originating summons except the following:

- (a) LR number 10060/10 Nairobi; and
- (b) LR number 80/7 (Original number 80/4/1 Kiambu.

Her share in those properties shall be according to her shareholding in Wachuchu Enterprises. The applicant is awarded the costs of this application. Those shall be the orders of this court.

MUTHEMBWA V MUTHEMBWA [2002]

COURT OF APPEAL OF KENYA AT NAIROBI

OMOLO, BOSIRE AND O'KUBASU JJA

Date of Judgment: 19 April 2002

Case Number: 74/01

SOURCED BY: LAWAFRICA

CITATION: [2001] LLR 3496 (CAK)

Importance

This is a recent decision of the Court of Appeal. It exemplifies the trend of reasoning in the *Kivuitu-Essa-Nderitu* line of cases. The case considers the novel issue, in Kenya, of whether a spouse can acquire an interest in property acquired separately by the other purely on grounds of the spouse's subsequent contributions to improving the property. The court also revisits the question of whether company shares can be the subject of a section 17 determination.

[1] Family law – Property – Property acquired separately by one spouse before coverture or gifted to one spouse during coverture – Property subsequently improved during the marriage – Whether such property can be subject of a section 17 application.

[2] Family law – Property – company shares – Whether section 17 application can deal with shares held by the husband in a company in which the wife also held shares.

[3] Family law – Property distribution – Whether the court has power to order the sale of property held to be jointly owned under a section 17 application.

Editor's Summary

The husband and wife in this case ceased cohabitation in 1992 and sought divorce. The wife concurrently filed originating summons seeking a determination of her share in the property acquired during coverture, which was all registered in the husband's name or in the name of certain companies jointly owned by the parties. The trial court after considering the evidence and ascertaining substantial contribution by the wife, determined that the spouses jointly held all the property.

The husband appealed. He contended that property acquired by himself as a gift prior to marriage should not have been divided, nor property whose title vested in a jointly owned company. The court also considered whether company shares could be subject to a section 17 application and whether the Court has power to order sale of the subject matter of the application.

Held:

1. Property inherited by or gifted to one spouse either before or during coverture can be the subject of a section 17 application, especially where such property is pooled with other property the couple may have and developed by their joint effort resulting in improvements to it. Such property would be taken as the contribution of the donee spouse to the family welfare.
2. Where the property subject to a section 17 application is encumbered by a charge or mortgage, the parties would only be entitled to share the remainder of the property after taking into account the joint borrowing. The court ought to determine the respective shares and liabilities of the parties on the basis of the net matrimonial estate on the date cohabitation ceases.
3. An application under the MWPA would not cover shares held by the respondent in a company in which the applicant also held shares in her own right. A fortiori, property held by a registered company should not be taken into account under an application to determine property rights between the spouses. *Mungai v Mungai* adopted.
4. The property would be valued for distribution purposes based on the net matrimonial estate, and the party wishing to retain the property bear the outstanding loans thereafter. Each party would be entitled to a half share in the net estate.

Assessment

This case is a *locus classicus* in our Kenyan family law jurisprudence. It marks a high point in the development of a *sui generis* family property regime. Concepts such as ‘family welfare’, ‘fair sharing of matrimonial property’, ‘wifely duties as a mother’ and ‘family income’ all have their place in this regime.³² No longer does the wife need to give detailed evidence of her contribution, because once the Court is satisfied that there was substantial contribution, equality of division would necessarily follow. No longer does the wife need to show that she acted to her detriment so that a constructive trust can be implied, or that there was a presumed intention in the case of an implied trust; there is a presumption that by carrying out the duties of wife and mother she has made substantial contribution to the acquisition of property.³³

32 It was not mere pedantry that led the Lord Justices in *Pettit* to decry the use of terms such as ‘matrimonial property’ and ‘family assets’. Though these terms are conveniently used to refer to all the property acquired by either spouse during coverture, they hide a latent error and mask the hidden tendency of migrating from the notions and principles of separate property to those of common property.

33 The Kenyan court generally seems to limit its investigation to ascertaining whether there was substantial contribution. If the contribution was de minimise, generally the property would be declared not to be jointly owned if the contribution was substantial, the court would generally not is a quantification of the direct and

[continued on next page]

In this regime, the burden of proof shifts to the person alleging that property acquired during coverture, regardless of legal ownership, is not jointly owned., hence, no longer do the efforts of wife and husband result in acquisition of separate property; rather, any property acquisitions will be deemed contribution to family welfare. Probably even separately, gifted property will fall under the imperious domain of the family assets regime, unless the owning spouse does not develop it, or uses funds that have been kept totally separate from the other spouse.³⁴

Here in stark reality is presented a regime of pseudo community property. In community property regimes there is a prior clear determination of the extent of the community property, whether universal community, community of movables and acquests, community of acquests or deferred community.³⁵ In separate property regimes, there is a need to prove referability of contribution by one spouse to the acquisition of the property if a trust is alleged. In the unique English post 1973 statutory regime separate property is softened by elaborate principles that give a matrimonial court express power to vary property rights between the spouses on divorce.³⁶ The Kenyan court has derived its own *sui generis* regime: an eclectic mix of community property, a rapidly vanishing heritage of separate property, a court inspired application of English statutory guidelines, a selective consideration of local property and marriage law statutes and a free interpretation of the ever changing situation of Kenya and its inhabitants.

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indirect contribution, both financial and non-monetary, that applies. Rather, the court would easily presume equal contribution and proceed to divide the properties equally.

34 In the ideal family where the couple lives in unity and solidarity, such property principles would not be of any moment. However, precisely for those spouses who jealously guarded their property hence triggering disunity and estrangement, the court subsequently ignores their marital circumstances and makes an equal distribution. Similar, considerations may be made for those spouses who pooled together their resources in good faith for the sake of the marriage, no matter how unequal their resources or contributions. When precisely the marriage fails, and a resulting trust should be imputed in favour of the spouse who made greater contributions, the court fails to investigate the evidence in order to ascertain a fair estimate of the proportionate contribution of each spouse.

35 The clear determination is especially necessary for third parties whose property rights get entangled with inter-spousal property rights. See Andrea Fusaro, *supra* note 21. "The Universal community is the most comprehensive type, as it regards not only assets acquired by either spouse during marriage but even those owned beforehand, and both through gainful activity or gratuitously. Community of movables and acquests excludes immovables owned separately prior to marriage, and those acquired thereafter by gift or succession, and movables of a personal nature. In Community of acquests the fund contains only assets acquired during marriage by gainful activity. Deferred community consists of a wide range of systems which combine separation during marriage with a final distribution of the assets of the spouses, or of shier monetary value."

36 *Supra* note 25.

In *Muthembwa*, the court considered that improvements to property by a spouse during coverture were effected out of family assets, especially where there was some joint effort of the spouses. The principles of proprietary estoppel were neither considered nor applied. The court felt called upon by the changing circumstances in Kenya to 'share' the 'family assets'. Yet for a reason not quite expounded, the Court would not include company shares, especially where both spouses were shareholders, in the juridical net of family property.

The court went further and considered the purported position of English courts,³⁷ whereby separate property is deemed the owning spouse's contribution to family welfare. It is admitted that English courts under section 25 of the Matrimonial Causes Act of 1973 have been invested with a wide discretion, to distribute, matrimonial property' at the time of divorce. Yet this is only a statutory right to vary property fights at the time of divorce on elaborated principles, not an abandonment of the separate property regime. Yet even were the English to abandon *separatio bonorum* through legislation, the Kenyan court would be well advised not to follow such a system without the wise prompting of the local Parliament.

The decision in *Muthembwa* once again leaves Kenyan family law of property in an unsatisfactory state. It shows that the Courts have long since abandoned recourse to the principles of quasi-contract and trust. There is no longer any mention of intention or imputation, only of contribution. Unless the Court is able to go back to the principles of common law separation of property, paying due regard to local property laws, then the time is ripe to jettison the whole regime in favour of a community property regime, where the spouses have a pre determined and certain share in the property of the marriage. Alternatively, the Kenyan legislature could retain separate property but intensely rework our matrimonial laws, in particular the Matrimonial Causes Act into a coherent legislative framework for determination and distribution of matrimonial property rights at the time of marital estrangement. This solution would of necessity imply a repeal of the Married Women's Property Acts of UK, which should be replaced with a local statute that is based on the Kenyan judicial system and is more amenable to amendment.

37 The decisions of English courts that have come to the editor's attention could not be further removed from the legal proposition expounded by this court. Even *Midland Bank plc v Cooke* 1995, court which granted the wife a declaration of equal ownership of property to which her contribution was quite unsubstantial, did it on the ground of presumed intention between the spouses to share the beneficial interest in the property.

Cases referred to in judgment

East Africa

Lilian Njeri Mungai v Dr Njoroge Mungai [1995] LLR 405 (CAK)

United Kingdom

White v White [2001] 1 All ER 1

Judgment

This appeal raises a number of what we think are serious and fundamental issues, which, hitherto, have not, to our knowledge, been considered or fully considered by this court in proceedings under section 17 of the Married Women's Property Act, 1882, of England which by dint of the provisions of section 3(1) of the Judicature Act, (Chapter 8) Laws of Kenya, was a statute of general application in England as at 12 August 1897, and therefore part of the law of Kenya.

The first one of those issues is, whether property inherited by or gifted to one spouse either before or during corveture is subject to an order under section 17, aforesaid. Hitherto the Court's approach has been that only those properties acquired during the subsistence of the marriage through the joint contribution, direct or otherwise, of the spouses would be subject to an order under the said section.

But in certain instances, as in the present case, as we shall later show, such property is pooled with the other property the couple may have and is developed by joint effort. The property then ceases to be in its original form and increases in value. Where the property exists in the same condition as at the time it was gifted, or inherited no problems arise. The spouse to whom it was gifted should be allowed to retain it.

Problems however, arises where as here, improvements have been made to the property using matrimonial resources which increase the value thereof. If it is landed property, may be a house has been built on it, trees have been planted thereon, and possibly perennial cash crops have been planted, and they yield a regular income. English courts consider such property as a contribution by the spouse to whom the gift or bequest is given to the welfare of the family and which courts should take into account, if the marriage breaks down, in considering the issue of fair sharing of matrimonial property.

In *White v White* [2001] 1 All ER 1, the House of Lords considered this question in great detail, and Lord Nicholls, who wrote the leading judgment of the Court rendered himself on the issue that:

“I must also mention briefly another problem which has arisen in the present case. It concerns property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust. For convenience I will refer to such property as inherited property. Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property and property owned before the marriage, on the one hand, and ‘matrimonial property’ on the other hand. A distinction along these lines exists, for example, in the 1985 Act in the New Zealand Matrimonial Property Act of 1976.

This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

Plainly, when present, this factor is one of the circumstances – it represents a contribution made to the welfare of the family by one of the parties to the marriage. The Judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant’s financial needs cannot be met without recourse to this property.”

Section 18 of the Matrimonial Causes Act (Chapter 152) Laws of Kenya, treats the wife judicially separated from her husband as a female sole for property acquired during separation which she may deal with as she deems fit. It is treated as her own property to the exclusion of her husband. Such property will not be the subject matter of her husband. Such property will not be the subject matter of an order made under section 17 of the Married Women’s Property Act, above, in an application by the husband under that section. Likewise, any property acquired by the husband after separation or divorce will not be the subject matter of an order under that section.

But by dint of the provisions of section 27 of the Matrimonial Cause Act, the Court issuing a decree for divorce or judicial separation has the power, if the reason for

the decree is adultery, desertion or cruelty 'of the wife', if it thinks fit, to order such settlement of the property which the Court thinks the wife is entitled to either in possession or reversion, as the Court thinks reasonable, for the benefit of the innocent party. This provision is not for the wife's benefit but for the benefit of the husband, in an appropriate case.

So, apart from the above two sections of the Matrimonial Causes Act, no detailed provisions exist providing for a detailed manner of dealing with matrimonial property. It would appear to us that traditionally no need arose for making any detailed provisions or indeed any provisions with regard to what we now call matrimonial property, as our society is patrilineal and all property is generally regarded as belonging solely to the husband. The wife's contribution towards the acquisition of any matrimonial property was not recognized.

But things have changed. We now have learned women, some holding positions where they earn more than their husbands and use their earnings to acquire new and to improve existing property. In certain instances the developments on existing property may be of substantial value. It is for that reason and the fact that circumstances which existed in traditional societies in Kenya have since changed, that a different approach is entailed to ensure fairness when it comes to determining title of gifted or inherited property. The wife's contribution or in the case of an application by the husband, his contribution to the development and improvement of such property has to be taken into account and the value of such development or improvement ascertained. It should however be remembered that each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.

The second fundamental issue raised by this appeal is, in cases where matrimonial property is encumbered by a charge or mortgage, how should the Court handling an application under section 17 deal with the unpaid loans?

The third issue raised is whether a court handling an application under section 17, has jurisdiction to deal with shares in a company in which one or both spouses are shareholders. In *Mungai v Mungai* [1995] LLR 405 (CAK) Kwach JA rendered himself thus:

"The application under section 17 of the Married Women's Property Act of 1882 could only deal with property held by the respondent as a husband. It would not cover shares held by the respondent in a limited liability company in which the wife also held shares in her own right."

In our case, questions have arisen as to title to two motor vehicles and certain landed property. As we shall show later, a certain landed property is registered in the name of

the appellant but on it stands premises allegedly owned by a limited liability company with the parties herein as the only shareholders.

The fourth point raised in the appeal, is whether in an application under section 17, a Judge has the jurisdiction to order the sale and distribution of the subject matter of such an application.

At the time of their marriage both parties were employed; the wife as a clerical officer with the Ministry of Lands and the husband as a town planner with the City Council of Nairobi earning a monthly salary of KShs 1 100 and KShs 2 600 respectively. The husband retained his job throughout corverture, but the wife intermittently went for further studies overseas, and changed jobs on at least three occasions. Her income from salary increased tremendously after her further studies. In 1992, she said, her salary was about KShs 12 000. The husband's salary was about KShs 9 000.

The couple acquired several properties during the subsistence of their marriage which include three pieces of land all registered in the husband's name on LR 12767/12 stands Park Place Hotel, which is run by ParkView Supermarket Limited and Kyaleka Properties Limited, are owned by the couple, which obtained loans to start and manager the hotel and supermarket and also to develop some of the landed property. The supermarket was later sold and the proceeds of the sale were used to reduce overdraft and loan facilities.

The parties shareholding in the remaining two companies was equal. It is also interesting that although LR number 12767/12 is registered in the name of the husband, improvements therein, including the hotel and other accommodation, is owned by Park Place Hotels Limited.

The couple established their matrimonial home on LR number 12661/58, were only the husband has been living since cohabitation ceased in December 1992. A decree of divorce was granted in 1995.

The other properties in issue are two motor vehicles, which are still registered in the name of Kyaleka Properties Limited.

On 19 July 1994, the wife took out an Originating Summons pursuant to the provisions of section 17 of the Married Women's Property Act, aforesaid, seeking, first, a declaration that all the aforesaid immovable and movable property though registered in the sole name of the husband or owned by limited liability companies, were jointly owned by her and the appellant and should be shared equally between the husband and herself. She also prayed for an injunction to restrain the husband from alienating, encumbering or in any other way disposing of the said properties.

The husband opposed the originating summons on the ground, inter alia, that the wife made neither direct nor indirect contribution to the acquisition of the properties. But in his judgment, the trial Judge Hayanga J found as fact that the wife made both direct and indirect contribution towards the acquisition of all the properties and held that her contribution was equal to that of the husband.

It was common ground that except for a short time when the wife was merely a housewife, she was engaged in gainful employment throughout the period of cohabitation between the parties. Her income was substantial. There was no liability companies they incorporated and managed. Both parties were signatories to the Parkview Supermarkets Limited bank account.

As rightly stated by the wife in her testimony, the establishment and management of the companies by them is clear testimony that she was not idle. She was making substantial contribution to the management and running not only of their home but also their business. Had she been idle it is doubtful whether the husband would have consented to have her as a co-shareholder in what he called his businesses and properties. It cannot have been a nominal 10 per cent as suggested. The wife is depicted as having been a very hard working woman. She advanced herself in education while at the same time she was an equal partner in the family business. She also engaged in wifely duties and as mother of his daughter. The Learned trial Judge rightly held that her contribution was 50 per cent.

There was debate as to how the only rural property in Makueni/Kako/493, was acquired. The wife stated that it was bought by the couple. The husband on the other hand said it was gifted to him by his uncle before he married the respondent. The trial Judge accepted the wife's version. On our part we take the worst scenario on the matter against the wife and assume that the property was gifted to the Appellant as he said.

The respondent testified that the land has been developed, several types of crops, mainly fruits were planted on it and that it is not in its original state. She was not challenged on that. It means that family income was used to develop that property. It is therefore property, as in the *White v White (supra)*, which should be taken into account as the appellant's contribution to the family welfare.

Besides, on the evidence on record, the wife is more believable when she said that the property was bought by the Parties during corveture. The property was not registered in the name of the husband until after cohabitation had ceased and a decree nisi for divorce had been granted. If the property was gifted to the husband in 1979, as he said, he did not explain why it took more than 15 years to have it registered in his name.

Property LR number 12767/12, where Park Place Hotel stands, WAS acquired during cohabitation the parties erected premises on it through either Kyaleka Properties Limited or Park Place Hotel Limited or both. By definition, it being an immovable property, the premises became part of the land (see section 3 of the Transfer of Property Act) as its walls are embedded in the subject property.

The two motor vehicles, which are registered in the names of a limited liability company, they were improperly taken into account.

Land reference number 12661/58 was purchased in 1988 before cohabitation ceased. The appellant stated in his evidence that he single-handedly bought the property. There is no evidence on record to exclude the contribution of the wife. In our view, therefore, the trial Judge properly took into account.

Perhaps this is a convenient point to deal with the issue of outstanding loans. We hasten to add that the date of reference, of necessity, must be the date when cohabitation ceased. We say so advisedly, as that is the date when both parties were jointly accountable. The loans were and are still a charge over the suit property, and the parties can only share the remainder of the property after taking into account the joint borrowing. A party not in possession should not, in our view, be held accountable for loans obtained after cohabitation ceased as he or she could not possibly do anything in the matter. So a court ought to determine the respective shares and liabilities of the parties on the basis of the net matrimonial estate on the date cohabitation ceased, and the party who seeks to retain the property should then bear the outstanding loans thereafter. Otherwise the best course open to them is to sell the property, repay the outstanding loans, and share the net proceeds.

We allow the appeal only to the limited extent that motor vehicle registration were taken into account when they should not have. We also set aside the order directing the division and distribution of properties owned by Limited Liability Companies, as the companies were not parties to the suit.

We therefore vary the decree by excluding the same, and also direct that the date of reference for valuation and distribution purposes should and subject to the settlement of existing loans under the charges and mortgages be the date when cohabitation ceased in December 1992.

The wife as the respondent in this appeal shall have three quarters of the costs of the appeal. Orders accordingly.

ASSESSMENT OF THE PART I CASES

The decision of the High Court in *Mbugua v Mbugua* of 14 May 2001 has refocused judicial spotlight on the interpretation of section 17 of the Married Women's Property Act. Section 17 of the Act, which concerns division of matrimonial property, states:

"In any question between husband and wife as to the title to or possession of property, either party may apply... to any Judge of the High Court... and the Judge ... may make such orders with respect to the property in dispute ... as he thinks fit."

In *Pettit v Pettit*, an English decision repeatedly cited with approval in Kenyan courts, the Houses of Lord affirmed that section 17 MWPA does not give a Judge discretion to pass title of property from the legal owners to the other spouse. A few years later in *Gissing v Gissing*, Lord Morris was emphatic, "The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had." In *Gissing*, however, Lord Reid held that where both spouses contribute to the purchase of property which is conveyed in the name of one spouse only, in the absence of a declaration of trust, the fact may impose an implied, constructive or resulting trust.

Pettit and *Gissing*, although superseded by statute in the UK, are still good law in Kenya. However, contradictory interpretations of these cases in local courts continue to cloud our jurisprudence. In *Karanja v Karanja*, the Court held that when property is purchased jointly by both spouses and registered in the name of the husband with the wife's approval, a resulting trust can be inferred in her favour.

The *Karanja* decision was reaffirmed in *Kivuitu v Kivuitu* by Omolo Acting JA (as he then was), who laid down the rule that where property acquired during coverture is registered jointly, it shall be presumed to be held in equal shares. In his *obiter dicta*, Omolo went further to presume that every wife has some interest in property acquired and registered in her husband's sole name due to her indirect contribution occasioned by fulfilling the duties of a wife and mother.

In *Essa v Essa*, the Court cited *Pettit* and purported to approve various passages of that decision denied the Court power under section 17 MWPA to pass title to property from one spouse to another. However, the Court then granted the appellant a 50% share in property registered in the sole name of the respondent. This string of reasoning reached its zenith in *Nderitu v Nderitu*, where Kwach JA fully endorsed and adopted the *obiter dicta* of Omolo JA in *Kivuitu*. Kwach, Shah and Pall JJA went further, relying on a post-1970 English authority to hold that, "in the absence of a clearly

declared decision (of the spouses) the Court does not consider how much one party or other contributes but decides on an equality of division.”

The Appeal Court therefore increased the appellant’s share in the disputed property, registered in the sole name of the deceased, from 30% to 50%. Without considering the provisions of the relevant property statutes or differentiating between singly and jointly-held properties, the *Nderitu* case anachronistically raised Kenyan law to parity with post- 1973 amended UK law.

While advocates continue to grapple with these conflicting authorities, the Appeal Court has already begun to reverse the tide. Gicheru JA was unequivocal in his partial dissent in *Kimani v Kimani*: the applicant’s share in property acquired during coverture would depend on the existence of a resulting trust in her favour and be proportionate to her direct and/or indirect contribution to the same.

Kamore v Kamore upheld *Gissing* and approved Gicheru’s dictum above. Tunoi, Shah and Bosire JJA restated the principle that no trust will be implied where is no evidence of contribution save in order to give effect to the intention of the parties. In this regard, the High Court decision in *Mbugua v Mbugua* leaves us again at a crossroads. Visram J had given a well-reasoned decision setting out the principles to be considered in determining section 17 application. The court has also dealt with the question, previously adumbrated in *Mungai v Mungai* of whether company shares –notwithstanding section 119 Companies Act fall under the section 17 jurisdiction.

However, as the decision in Muthembwa has shown, our inter-spousal property law has not yet reached an equilibrium. Will the flux ever settle, or will differing magnetic fields condemn it to a never-ending turbulence? Only time can tell.

AHN V OPENDA [1982]

COURT OF APPEAL KENYA AT NAIROBI

SIMPSON CJ, POTTER JA AND KNELLER AG JA

Date of Judgment: 10 June 1982

Case Number 7/81

SOURCED BY LAWAFRICA

CITATION: [1981] LLR 1209 (CAK)

Importance

Insofar as the Court of Appeal dismissed the decision herein on account of the failure to serve one party directly affected by the appeal, this decision is really not a milestone in family law of property. However, the decision is a useful illustration of the interaction between family law and other areas of property law. In a sense the Court must reconcile the contributing spouse's equitable interest with the equitable interest of a *bona fide* purchaser without title. Which equitable interest will receive priority?³⁹

This is the first recorded case where the Court of Appeal considered the decision in *I v I* that the Married Women's Property Act of 1882 of England applied to Kenya.

[1] *Family law – property of spouses – Property registered in husband's name – Wife claims beneficial interest in half share of the property – Agreement of sale between husband and third party – Whether husband can be restrained from transferring property to third party – Whether purported sale by husband to third party is void and of no legal effect.*

Editor's Summary

The application herein was made by notice of motion under the inherent jurisdiction of the Court and under section 17 of the Married Women's Property Act. The applicant sought orders that her husband held half share of the subject property in trust for her, and that the purported sale of the same to the third party was null and void. The Learned Judge made the orders sought and the third party appealed. One and a half years after the appeal was filed and after another advocate had come on the record for the appellant, and *ex parte* application was made to dispense with service of notice of appeal on the husband who had not taken part in the proceedings. It was contended that such an application was incompetent because the time for filing and serving notice

³⁹ Tanzania has partly solved this problem through the Law of Marriage Act, 1971. See *Mwakalindile v NBC Holding* (*infra* page 172).

of appeal had expired. The third party in response applied for extension of time of the appeal under Rule 4 of the Court's Rules.

Held: The appeal was incompetent because the notice of appeal was not served on all the parties directly affected by the appeal within the time allowed. The single Judge had no discretion to grant the *ex parte* orders to dispense with service of the appeal.

The Court would also not extend time for serving notice of appeal because no adequate reasons had been given for the delay

Per curiam:

- (i) While there had been no decision of the Court of Appeal on Whether the Married Women's Property Act is a statute of general application, the decision in *I v I* [1971] 278 is good law in Kenya.
- (ii) There is an appeal as of right from a decisions of the High Court under section 17 of the Married Women's Property Act.

Assessment:

This is one of those cases that would have contributed immensely to the jurisprudence of Kenya on the question of matrimonial property and the rights in rem of the applying spouse prior to the determination of her title. However, the chance was lost; another tribute to the sacrifice of substantive justice at the altar of technicality.

As the high court judgment was left undisturbed, it seems that a Kenyan court would prefer the equitable interest of a contributing spouse to that a *bona fide* purchaser without title if there was a conflict of interest between the two. A sly vendor who subsequently wishes to avoid his contract, maybe because the bargain was not right, would easily make use of such a state to law by colluding with his wife to demand her share of interest in the property.

On the other hand, if law were to lean in favour of the equitable purchase, a sly spouse would easily sell the property and conceal the proceeds from the sale to defeat a claim by the contributing spouse for a beneficial interest therein. This would be a proper situation for application of the maxims of equity to arbitrate between competing interests. Maxims such as 'equity follows the law' and 'equity aid the vigilant', he who come to equity must come with clean hands' and 'he who seeks equity must do equity' would probably be applicable in such as case. Naturally, all things being constant, the party who registers a caveat over the property would probably receive the favourable indulgence of the law.

Case referred to in judgment

I v I [1971] EA 278

Judgment

POTTER JA: This appeal is described as an appeal from a ruling and order made in the High Court in Nairobi by Wilkinson-Guillemard J on 22 May 1980. The order was made upon the application y notice of motion under section 3 of the Civil Procedure Act, Order L of the Civil Procedure Rules and section 17 of the Married Women's Property Act, filed by the respondent who joined the appellant and her husband, Thomas Joseph Openda, as respondents. The purpose of the application was to protect the applicant's legal interest in the matrimonial home, plot number LR 2951/62 at Lower Kabete, Nairobi, and to restrain the applicant's husband from selling the plot to the appellant under an agreement of for sale made between the husband and the appellant on 25 January 1977. The applicant was successful and Judge made orders to the following effect:

1. That Thomas Openda holds one half interest in the plot in trust for the applicant wife.
2. That the purported sale by Thomas Openda to the appellant is void and no effect.
3. That Thomas Openda be restrained from transferring the plot to the appellant
4. That Thomas Openda be restrained from selling or alienating the plot to anyone

It will be observed that Thomas Openda is named in and affected by all these orders. The appellant filed notice of appeal under Rule 74 of the Rules of this Court against the whole of the decision of the Judge on 3 June 1980. Rule 76(1) requires service of the notice of appeal on all persons affected and is as follows:

"76(1) An intended appellants shall, before or within seven day after lodging notice of appeal, serve copies thereof on all person directly affected by the appeal:

Provided that the Court may on application which may be made *ex parte*, direct that service need not be effected on any person who took no part in the proceeding in the superior court."

The notice of appeal was served by the advocate then acting for the appellants on the respondent Jennifer Openda, but was not served on the husband Thomas Openda. In July 1980, Mr Nagpal was appointed to act for the appellant in place of his previous advocate. On 26 January 1981, in civil application number 2 of 1982, Mr Nagpal obtained the *ex parte* order of Law JA under Rule 76(1) dispensing with serve of the

notice of appeal on Thomas Openda on the ground that he had taken no part in the proceedings in the High Court.

(...The court then considered the effect of the failure to serve or obtain order dispensing with service of notice of appeal in time. The Court on this ground declared the appeal herein incompetent.

Mr Oraro raised another objection to the competence of the appeal. He submitted that leave the appeal was required under the provisions of the Married Women's Property Act of 1882 and that such leave has not been obtained. For the purposes of these proceedings I assume that Act is statute of general application. It was contended in the appellant's Memorandum of Appeal that the Act was not such a statute, but the point was not argued before us. There has been decision of this court on the point, but in *I v I* [1971] EA 278, Trevelyan J held that the 1882 Act was a statute of general application, and that decision appears to have stood unchallenged to this day.

I do not find any merit in this submission of Mr Oraro. The effect of section 3(1) of the Judicature Act is that the provisions of the Married Women's Property Act must be read subject to the written law of Kenya and the provision of the written law relating to appeals as of right from the High Court to this Court are to be found in the Civil Procedure Act and in the rules made thereunder. Section 66 of the Act provides for an appeal as of right from the decree or any part of the decree and from the orders of the High Court I have no doubted that this appeal is an appeal from a decree of the High Court. A decree is defined by section 2 of the Act to include "The formal expression of an adjudication which, as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit".

During the hearing the question arose as to whether section 75(1)(h) of the Act and Order XLII had any application to this appeal. I think it became clear finally that those provision did not. An order is defined by section 2 of the Act as "the formal expression of any decision of a court which is not a decree ..." The combined effect of Rules 1 and 3 of Order XLII is that appeals lie as of right under that order only in the case of decisions under the orders specified which are "orders" as defined in section 2 of the Act and not 'decrees' as so defined.

SIMPSON CJ: Concurred.

KNELLER AG JA: The appellant's advocate before or within seven days after he lodged his notice of appeal should have served copies on all person directly affected by the Appeal.

(... His Lordship considered the effect of failure to serve the notice on Thomas Openda).

The motion on notice of the responder was made under section 3A of the Civil Procedure Act and Rule L of the Civil Procedure Rules together with section 17 of the Married Women's Property Act 1882 of England, which by section 3(1) of the Judicature Act (Chapter 8) has been held by the High Court to be a statute that applies in this matter so it is read subject to the written laws of Kenya which brings in the Civil Procedure Act and its Rules and their provisions relating to appeal as of right.

The result of the proceedings in the superior court conclusively determined the rights of the appellants, the respondent and her husband to at least some matters controversy in the suit (example the purported sale of the premises at Lower Kabete Nairobi by the husband to the appellant was declared to be null and void and, instead, they were to be held on trust by the husband in equal shares for himself and the respondent) so a formal expression of this adjudication is a 'decree' section 2 of the Civil Procedure Act. It was not, therefore, an "order" an Odrer XLII, rules 1 and 3 of the Civil Procedure Rules were irrelevant. This decree of the High Court is what the appeal was from so there was an appeal as of right. Section 66 (*ibid*).

Accordingly, I agreed that the order of Law JA in Civil Application 2 of 1982 should not, with respect, have been made and should be set aside.

It follows that the appeal is incompetent and must be struck out with the costs of the appeal being awarded to the respondent.

KABUI v WAIRIMU [1985]

COURT OF APPEAL KENYA AT NYERI

HANCOX, NYARANGI JJA AND GACHUHI AG JA

Date of Judgment: 19 September 1985

Case Number: 52/83

SOURCED BY: LAWAFRICA

CITATION: [1983] LLR 1324 (CAK)

Importance

This case is interesting because the Court considered whether, in the absence of a marriage, property acquired during long cohabitation would be a subject of a trust based on the relationship of the parties. The court seemed to imply that it would and ordered the case remitted back to the High Court for a determination of this issue.

[1] Family law – Presumption of marriage-Property in dispute – Allegation of trust – 10 year cohabitation between the parties – Whether existence of marriage could affect the woman’s right to the land.

Editor’s Summary

The plaintiff claimed to have acquired some interest in land that she had registered in the name of her alleged husband. There was no evidence of a formal marriage but the woman sought to rely on a presumption of marriage to imply a trust in her favour over the property wherein she was living.

Held: The case would be remitted to the High Court to determine the existence of presumption of marriage and the extent to which it would affect the woman’s rights.

Assessment

This decision manifests the opinion that the existence of marriage would affect the acquisition of rights between two parties who had cohabited together. In contrast, in the UK, the absence of marriage between two cohabiting parties would not affect the imputation of a trust if the conduct of the parties was sufficient to impute one.⁴⁰

⁴⁰ See for example *Hammond v Mitchell* [1991] 1 WLR 1127 where the parties had cohabited for over ten years before breaking up. The court applied the trust principles without any inhibition regarding the marital status of the parties.

Judgment

NYARANGI JA: The respondent, Joseis Wanjiru alias Joseis Wairimu filed a civil suit number 71 of 1982 in the High Court Nyeri against Ndegwa Kabui, the appellant claiming in her plaint that since or about the year 1960 she had been living with the appellant although there was no formal marriage contracted between them that they had been issue to the relationship between the parties, that during the year 1964 she obtained a parcel of land at Warazo Settlement Scheme which she, in agreement with the appellant, caused to be registered in the name of the appellant in trust for her, that the appellant who was married to another woman at the material time, had declared to the respondent that she was no longer his wife and in breach of the understanding that the land is registered in the appellant's name in trust for her, he intended to deprive the respondent of her ownership of land. She contended that although she was at all times an allottee for the settlement land trustees subject to a trust wherein she was the sole beneficiary, despite demand duly made, the appellant had failed or neglected to transfer the land to her. She prayed for a declaration that she is the allottee of the parcel of the land subject to a trust wherein she is the beneficiary and an order that the appellant do transfer to her all the parcel of land.

The appellant as defendant denied completely that there was an issue of the relationship, that the land was registered as claimed in the plaint and said there was not aware of an trust relating to the land. The appellant counter-claimed and stated that he had:

“Determined the licence he had granted to the plaintiff to live on the suit premises ...”

and prayed for the suit to be dismissed. The High Court (O’Kubasu J) held the trial between 22 April 1982 and the 8 February 1983 and on the 5 May 1983 entered judgment for the responder as plaintiff, ordered the appellant to transfer the parcel of land her and dismissed the counterclaim of the appellant as defendant.

The appellant had challenged that decision on grounds summarisable as follow: there was no evidence that a trust existed in favour of the respondent, it was an error to admit copies of original documents which had not been produced, and in concluding that the copies were no forgeries, it was a misdirection to find that the respondent could afford to pay of KShs 1 200 deposit and that the Judge erred in believing the contradictory evidence of the respondent:

(... His Lordship then considered whether certain documents produced in evidence were genuine and concluded that they were forgeries).

The respondent relied, albeit belatedly on her cohabitation with the appellant from 1965 to 1975 as constituting a presumption of marriage in her favour. I must point out right away that the respondent did not in her plaint rest her claim of trust on a presumption of marriage. She however raised it and Mr Muchemi replied to it.

(... The court then considered the authorities on presumption of marriage.)

There was evidence before the High Court on the duration of the cohabitation between the parties. Whether or not it arose and assumed a distinct and binding role or whether it was rebutted is a question of fact which the Judge should have considered and determined. It is not appropriate for this court to decide it, notwithstanding that the respondent, who appeared in person, was allowed to raise it. I would remit the case to the High Court for a decision on this issue and if in favour of the respondent the extent to which it affects her claim to the land.

In the result, the appeal is allowed and the decision of the High Court is set aside. The counter-claim succeeds. I would however make no order as to costs of counterclaim.

HANCOX AND GACHUHI JJA: (Concurred.)

RUSSELL CO LTD v COMMERCIAL BANK OF AFRICA LTD [1985, 1993]

COURT OF APPEAL KENYA AT NAIROBI

KNEELLER, NYARANGI JJA AND PLATT AG JA

Date of Judgment:

Case Number: 31/85

SOURCED BY: LAWAFRICA

CITATION: [1985] LLR 1415 (CAK)

COURT OF APPEAL KENYA AT NAIROBI

GICHERU, COCKER AND MULI JJA

Date of Judgment: 15 October 1993

Case Number: 89/91

SOURCED BY: LAWAFRICA

CITATION: [1991] LLR 2340 (CAK)

Importance

The decisions on this case have a far greater importance in ordinary mortgage law than in family law. Since clearly a company jointly held by the spouses owned the matrimonial home, the doctrine of corporate personality would make this case strictly not part of family law. The cases are however useful as an illustration of the devices that could be used by spouses to own property jointly and how far the law would tolerate equitable considerations to defeat express legal provisions.

The quoted excerpts of the decision deal with the question of whether the chargee had fulfilled its duty to provide the equitable chargor with the opportunity to exercise the right of redemption. This part of the judgment is important as similar questions arise in family law when a spouse claims an interest in charged property registered in the name of the other spouse.⁴¹

[1] Family law – Property of spouses-Property registered in husband's name – Allegation that property was owned by jointly-owned company of the spouses – Wife registered caveat-Caveat removed-Property charged to Bank-Bank auctioned property in exercise of statutory power of sale-Transfer registered Whether wife has cause of action.

[2] Land – Mortgage-Property of spouse-Matrimonial home – Owned by company in which spouses were joint shareholders –Allegations of fraud – Husband charged property to bank – Property sold in exercise of statutory power of sale – Property was registered in husband's name –

⁴¹ See for example *Kitale v Kitale* where the court decided in favour of a contributing spouse after finding that she had been denied opportunity to exercise her equitable right to redeem.

Transfer effected to successful purchase – Whether wife or company could reverse transaction on ground of fraud.

Editor's Summary

The Court of Appeal in 1985, reversed the decision of the trial court refusing to grant an injunction to the Russell Company, which had sued on the basis that it was the beneficial owner of the property registered in the name of Mr Russell. Eight years later when the appeal to the substantive application was heard, the Court of Appeal dismissed the suit of the Russell company on the ground that there was no cause of action against the successful purchase of the property at the auction. One of the issues canvassed in the appeal was whether the chargee had frustrated the right of the equitable chargor to redeem the property.

Held: There was no evidence that the equitable chargor had intended to or had been denied the right to redeem the property.

Per curiam: While the notice to the equitable chargor had not strictly complied with the form of notice required to be given to a legal chargor (no amount was stated), it had sufficiently notified the equitable charger of the impending sale and given adequate notice and opportunity for redemption.

Note: A 5 member bench in *Trust Bank v Eros Chemists* [1999] LLR 1008 (CAK) expressly overruled the decision of this court on the validity of a statutory notice to a legal chargor that gave a period of less than 3 months from the date of service for redemption.⁴²

Assessment

The court did not quite conclusively rule on what notice is required to be given to an equitable chargor. However, the *per curiam* quoted herein is not easily faulted if one considers the obvious difficulty of a chargee learning of the existence of an equitable chargor whose interest is not stated in the register. There would probably be more force to the argument of an equitable chargor that he should be given an opportunity to redeem if his interest was indicated by a caveat or inhibition in the register.

⁴² The court in *Trust Bank v Eros Chemists* held that *Russell v CBA* 1991 had been wrongly decided on the question of statutory notice.

Judgment

COCKAR JA: On 10 August 1984 Russell company Limited, the appellant company, filed a suit against Commercial Bank of Africa Limited, the first respondent (hereafter referred to as the bank) and Land Development Limited, the second respondent, wherein all the parties have pleaded as follows:

The bank has admitted that the plot of land LR number 7336/54 (hereinafter referred to as ‘the charged property’) was registered by a transfer in the name of Nicholas James Russell as a purchase thereof and charged to the bank under a charge dated 6 July 1979, and governed by the Indian Transfer of Property Act.

Both the respondents denied the appellant’s pleading that it was the beneficial owner of the charged property which Mr Russell was holding in trust for the appellant, or that either of them was aware of the facts as pleaded in the plaint.

The bank further pleaded that it was a stranger to the alleged trust and that it had dealt with Mr Russell as an absolute indefeasible owner of the charged property which it advanced money to him on the security of it. It denied being a party to fraud or misrepresentation and charged to have advanced the loan in good faith and without notice of the alleged beneficial ownership. (...)

Finally again on the question of sale and transfer of the plot it was pleaded in the plaint in the alternative that the same were effected despite numerous protests of the appellant and in breach of the following duties owed by the bank at common law, equity and the Indian Transfer of Property Act of 1882:

- (a) To act honestly in order to ensure that the appellant was apprised of its right to redeem the indebtedness of Mr Russell under the charge.
- (b) To do everything in the bank’s power to obtain the true market value when exercising its power of sale.

The bank denied these allegations and further claimed that the charged property was sold at the prevailing market price and according to a professional valuation obtained prior to the sale (...)

Briefly the facts are that by a transfer dated 20 March 1971, Mr Nicholas James Russell, in consideration of a sum of KShs 290 600 was registered as the owner of the property LR 7336/54 being 4.1 acres in areas with a dwelling house erected and being thereon, on Miotoni Lane, Karen. By a charge dated 30 April 1971, the suit premises were charged to Housing Finance Company for 140 000. The suit premises were intended and in fact used as a matrimonial residence for Mr Russell and his wife who

were the joint shareholders and directors of the appellant company of which Mr Russell held 51 shares. In 1977, Mr Russell left his wife and the house (the charged property). The break-up ended in a divorce.

Mrs Russell had continued living in the charged property for some time after Mr Russell left and according to her, it was she who arranged for the payment of the Company's debts including the debt to the Housing Finance Company Limited. It was then that her advocate Mr Maini found out that the charged property was registered in the name of Mr Russell and not in the name of the Company who, according to Mrs Russell, had been intended to be the purchaser and proprietor of the property. She there upon caused a caveat to be registered against the title of the charged property on 8 November 1978. In the meantime during December 1978. Mr Russell commenced negotiation to obtain to a loan from which sum he planned to pay off the balance of loan due to the Housing Finance Company Limited. In the process on 29 May 1979. M/s Hamilton Harrison and Matthews, advocates for the Bank, noticed the caveat and informed the bank about it on 30 May 1979. Mr Russell managed to get the caveat removed and with effect from 30 August 1979, charge of Housing Finance Company Limited was discharged and a charge in favour of the bank was created and registered on 6 September 1979, by way securing a loan of ?KShs 60 00 advanced to Mr Russell. Mrs Russell, the managing director of the appellant company, said that she knew nothing of the discharge and the new charge nor of the removal of the caveat. She had no knowledge of any of the correspondence relating to the removal of the caveat.

Following a car accident and gang attacks at the charged property, Mrs Russell a on advice of the Karen police, moved from the charged property which she rented to one Mr Edward Rice of the World Bank. He paid the rent to her regularly. About a year later Mr Russell approached him and demanded a years' rent in advance to be paid to him. On Mrs Russell's advice he filed inter-pleader proceedings in the High Court (Miscellaneous civil case number 1980) involving Mr Rice, Mr Russell and the appellant company. Masime J (as he then was) on 21 July 1981, ruled in the inter-pleader proceedings that Mr Russell had fraudulently procured the registration of the charged property in is own name and that he was holding the same in trust for its true owner that is the appellant company. Masime J directed the Registrar of Titles to cancel the registration of Mr Russell and substitute the name of the appellant company as the registered owner. On 14 January 1982, on application of Mr Russell the Judge granted a stay of this order pending determination of appeal against his decision. The filing of the appeal and this stay order according to Mrs Russell, barred the appellant from effecting the transfer of the charged property into it own name.

Mr Russell was unable to service the charge in favour of the bank satisfactorily and started getting informal written demands for payments of the loan and the accumulated

interest. By 26 October 1981, the bank had come to know from the letter of Mr Russell dated 21 October 1981, that the Court had decreed that the Mr Russell's title to the charged property had been obtained fraudulently and also that he was arranging to appeal against the decision. The bank sought advice from their advocate M/s Hamilton, Harrison and Matthews, with regard to the validity of the charge. On 30 October 1981, the bank's advocates M/s Hamilton Harrison and Matthews sent a final notice to Mr Russell. This final notice was not copied to the appellant.

The bank, however, instead of proceeding to exercise its statutory power of sale, filed a suit on 24 January 1983, in the High Court against Mr Russell for the amount due. The decreed appears to have remained unsatisfied. Having lost any hope recovering the decretal amount from Mr Russell, the bank eventually decided to exercise its statutory right of taking under the charge and at that time its said advocates on 30 January 1984, wrote to the appellant as follows:

“30 January 1984

The Russell and Co Ltd...

Re: LR No 7336/54

We refer to the above mentioned parcel of land which is presently charged in favour of our client, Commercial Bank of Africa Limited, and would advise you that the mortgage money has been called in but no payment has been received. In the circumstances we are advertising the property of sale by public Auction.

Yours faithfully,

For Hamilton Harrison and Matthews

JM Gikonyo”

It will be observed that the loan amount due is not specified in the above letter.

Mr Vohra, on behalf of the appellant, responded on 2 February 1984, with a lengthy letter (...)

The bank respond dated 6 February 1984 through M/s Hamilton Harrison and Matthew was that it was not a party in the inter pleader, that a recent search at the land registry had revealed that the land was still properly charged in favour of the bank and that they had been left with no alternative but to proceed with realization of the security.

It is to be noted that the appellant was not agitated into taking any protective steps against the sale even after receipt of the two letters of 2 and 6 February 1984, from

M/s Hamilton, Harrison and Matthews, before it again wrote to Mr Russell informing him of the sum then due and that M/s CB Mistri had been instructed to sell charged property by public auction and advising him of what to pay if he wished to stop the sale. In due course the advertisement for sale fixed for 5 July 1984, appeared in the Standard Newspaper dated 6 June 1984, 4 July 1984. On 5 July 1984, the charged property was sold at a public auction to the second respondent, Land Development Limited for KShs 1.1 Million, which was the reserve price.

Mr Vohra's evidence was that on 13 July 1984, after he and Mrs Russell had seen Mr Mistri in the morning to check on the advertisement in the Standard he went and saw Mr Nyamu in the afternoon

There is no evidence up to this stage that the second respondent had any knowledge of the unregistered beneficial interest of the appellant in the charged property.

Mrs Russell, the managing director of the appellant company said that it was on 13 July 1984, that she came to learn through Mr Peter Mbaisi, the property manager of the appellant company that the charged property had been sold. On 15 July 1984, she moved into the house herself because the tenant Mr Young had moved out.

Mr Wangunyu (DW6), the managing director of the second respondent who had been to the charged property on 2 and 3 earlier occasions and had met Mr Young also, came to the charged property on the evening of 15 July and now met Mrs Russell. When he told her that he had purchased the house and wanted her to vacate she looked annoyed and hostile. She told him that it was her house and it could not be sold. Mrs Russell's account of the incident was that she showed him the Court order in which he did not appear interested. Mr Wangunyu was that he did not remember Russell Company being mentioned but when she had mentioned that it was her house he thought that she was a joint owner. Both confirmed that Mr Wangunyu offered to sell back the charged property to Mrs Russell of KShs 1.5 million. Mrs Russell said that she told Mr Wangunyu that she was going to court to get an injunction to stop the registration and transfer of the property but the latter said that he did not remember Mrs Russell saying on 15 that she was going to stop the sale adding that there was not much discussion on the 15. I have gone into this conversation between the two because it is clear, and so did the Learned Judge find, that the second respondent now had a knowledge of the existence of an unregistered proprietor's interest in the property.

There are ten grounds of appeal filed from the judgment of the High Court. Mr Gautama, who conducted the appeal on behalf of the appellant, however argued all of them together on the basis that the appeal centred around one and one point only that

it was the duty and obligation owed by the a chargee under the Registration of Titles Act, Chapter 281 Laws of Kenya (in short referred to as RTA) to the legal chargor and whether a corresponding duty and obligation of similar extent and degree was owed by the chargee to an equitable chargor who, before the exercise of the statutory power of sale, the chargee came to learn reliably was the real and true beneficial owner of the charged property and that the registered owner was a mere nominee of trustee. Mr Gautama conceded that as far as the validity of the charge to the bank was concerned that was not being challenged. His other main submission centered around the legality of the statutory notices and the existence of fraud in the sale and transfer of the charged property.

(... His Lordship considered the validity of the statutory notice.)

I now come to the claim that the bank's failure to serve the appellant with a statutory notice had resulted in the appellant, the true owner of being deprived of its equity of redemption. I do not see anywhere in the Transfer of Property Act or the RTA that requires a notice in the form as prescribed in section 69A of the Transfer of Property Act to be served on a party having an unregistered interest in the equity of redemption. However, a notice in fact was given by the bank to the appellant company on 30 January 1984, informing it of the salient facts, that the bank was the chargee of the charged property, the mortgage money had been called in but no payment had been received and so the property was going to be advertised for sale by public auction. It is to be noted that Mrs Russell, the managing director of the appellant company, and the real moving force behind these proceedings, had known since much earlier that the property was charged to the bank. (...)

The bank, however, did not sell the property after 3 months but did so after 6 months on 5 July 1984, following three advertisements of sale by public auction in the Standard on 6 June 1984, 20 June 1984, and 4 July 1984, that Mr CB Mistri had been instructed to sell the charged property by public auction and the sale could be stopped on payment of the sum due details of which were given. (...)

What matters at this stage is that the appellant was not at all interested in exercising its right under the equity of redemption. That attitude on the part of the appellant negates all the arguments put forward on its behalf by Mr Gautama that the appellant had been deprived of its equity of redemption by the acts of the bank including failure to serve a statutory notice on the appellant. The appellant had no intention to exercise its equity of redemption. On account of that even the accusation of laches on the part of the appellant, on which it clearly would have been justifiably and soundly faulted, becomes irrelevant. Apart from that the appellant had been served, 6 months before the sale, with a notice apprising it of the fact that the mortgage money had been called in,

no payment had been received, and the property was going to be advertised for sale by public auction.

It is pointless now for me to go into question of whether or not a notification to a person having an unregistered interest in a charged property must strictly comply with the requirements of section 69A of Transfer of Property Act. But what at least is clear from the wording and the contents of the letter of 30 January 1984, sent on behalf of the bank is that there was sufficient warning given in clear terms of what was being proposed to be done to the charged property on account of non-payment of the mortgage debt. That, to my mind, was sufficient to activate any reasonable person who was genuinely interested in the equity of redemption into taking appropriated steps. As regards Mr Gautama's complaint regarding non-disclosure of the amount due in the said notification, in my view any reasonable person interest in the equity of redemption would have enquired about the amount due. Mr Vohra made it abundantly clear that the appellant company was not interest in exercising its right to the equity of redemption. Mr Gautama's reference to section 52 of the Transfer of Property Act is not relevant because upto this stage, that is upto the time of sale, there was no suit pending between the parties hereto.

(... His Lordship considered the claim that the auction had been conducted fraudulently.)

In the result I propose that this appeal be dismissed and costs be awarded to both respondents.

MULI AND GICHERU JJA: (Concurred).

WANJIKU v MUTISO [1988]

COURT OF APPEAL KENYA AT NAIROBI

PLATT, GACHUHI JJ AND MASIME AG JA

Date of Judgment: 12 May 1998

Case Number: 109 and 112/86

SOURCED BY: LAWAFRICA

CITATION: [1985] LLR 1415(CAK)

Importance

While the Kenyan court has for long been apparently oblivious of the application of the doctrine of trust to the Married Women's Property Act, this case illustrates that this doctrine had been applied to questions between husband and wife as to property even in the 1980's. The decision in this case also considers the effect of the presumption of advancement to property dealings between spouses.

[1] Family law – Property of spouses – Trust – Property originally owned beneficially by husband detained in prison – Property transferred to wife by deed of gift – Subsequent separation of spouses – Husband seeks to set aside deed of gift and a declaration of trust.

[2] Trust – Husband's property transferred and registered in the name of the wife – Deed of gift executed – Parties intend to allow wife to deal with the property while husband incarcerated – Whether deed of gift would be set aside and trust declared.

Editor's Summary

W and M were husband and wife. In 1967 during the course of their marriage, M acquired a farm through two loans, both of which were secured by charges on the farm. M was a Member of Parliament but was jailed for 9 and a half years in 1971 for sedition. M fell into arrears in mortgage payments. M made out a power of attorney in favour of the wife but he was subsequently obliged to transfer the farm into her sole name. He executed a deed of gift to that effect. Subsequently the parties grew apart and when M was released they were unable to resume their married life together. M therefore filed suit claiming that his wife held the property as his trustee and she should transfer the same back. The issues that arose for consideration were (1) whether the deed of gift was void; (2) whether there was an express trust in favour of the husband ; (3) whether in the absence of an express trust, a resulting trust could be implied.

The court ruled in favour of M and the wife appealed.

Held:

1. While the husband did not clearly plead resulting trust, the facts of the case and the pleas of 'trust' effectively referred to a resulting trust. *Gandy v Caspair Ltd* [1956] 23 EACA 140, *Dhanji Ramji v Rambai and Co* [1970] EA 515 considered.
2. There was no express trust in this case because the transfer was specific and expressly by the way of gift.
3. Where property is transferred to another as a gift with the intention that the latter hold it as trustee for the former, a resulting trust may be implied *Hodgson v Marks* [1971] Ch Adopted; *Tinker v Tinker* [1970] 1 All ER 136 distinguished; *Heseltine v Heseltine* [1971] WLR 342, *Hussey v Palmer* [1972] 1 WLR 1286 considered.
4. The presumption of advancement should only be made so as to accord with the social conditions in Kenya and to conform to the most likely intentions of the spouse. In this case, the strength of the presumption would be much diminished. There was sufficient rebuttal evidence that it was not husband's intention to make an absolute gift to the wife. A constructive trust would therefore be imposed to prevent the wife from taking fraudulent advantage of her husband. *Shepherd v Carwright* [1955] AC 43, *Pettit v Pettit* [1970 AC 777 adopted, *Marchslla v Crutweel* [1875] LR 20 Eq 328, *Re Figgis* [1968] 1 All ER 1009 considered.

Appeal dismissed.

Assessment

This was not an easy decision to reach. Here was a clear and unequivocal deed of gift by a man to his wife. The man had not intended to make an absolute gift and had been clearly reluctant to do it. Yet the man was in prison and it appeared to be the only way for the wife to effectively manage the property. So he made out the deed of gift. After subsequent souring of relations and eventual breakdown of the marriage, the man came to court seeking rectification of the register to show himself as the absolute owner of the property on the ground that he was beneficially entitled to the same.

The court had to decide whether to vary the plain meaning of the deed of gift. Was there an express or resulting trust implied? Justice Platt does an admirable analysis of various English decisions on the doctrine of resulting trust. Lord Denning's view in *Hussey v Palmer* that a constructive trust may be imposed regardless of established legal rules is compared to the decision in *Tinker v Tinker* that a trust would not be implied if the intention of the transferor had been to defeat that laws. The court leaned in the direction of *Hussey v Palmer*, although not going to the full length of Lord Denning's ratio.

Once again, the Court visited the presumption of advancement; it held that this presumption would not have a significant rule to play in Kenya today. *Pettit* was adopted, long before the line of decisions in *Kivuitu*, *Essa* and *Nderitu* had begun. Surprisingly, two of the Judges in this case were also part of the bench in the *Kivuitu* case. It must however be noted that the part of the decision in *Kivuitu* that subsequently and somewhat erroneously gained currency was of Justice Omolo, the third Judge in *Kivuitu*.

Cases referred to in Judgment

East Africa

Dhanji Ramji v Rambai and Co [1970] EA 515

Gandy v Caspair Ltd [1956] 23 EACA 140

United Kingdom

Blay v Pollard and Morris [1930]

Heseltine v Heseltine [1971] WLR 342

Marshall v Crutwell [1875] LR 20 Eq 328

Pettit v Pettitt [1970] AC 777

Re Figgis [1968] 1 All ER 1009

Shepherd v Cartwright [1955] AC 431

Tinker v Tinker [1970]

Judgment

PLATT JA: The two appeals above were heard together, although in the opinion of Mr Lakha who appeared for the appellant, if this client succeeded in Appeal number 109 of 1986, there would be no need to continue on the Appeal number 112 of 1986. That submission involves the consideration that the first mention of these appeals was preferred against rulings on two preliminary issues based on the effect of the limitation of Actions Act (Chapter 22) on the two alternate causes of action. Hence, if both causes of action were time-barred, then there would be no need to go further. On the other hand, the judgment after the trial dismissed the first cause of action, which had been expressed in several over-lapping forms but accepted the second, which was based on trust. Looking at the situation as whole, in my opinion the Learned Judge, was within his rights to allow the trial to go on, by ruling that the issues were not time barred, and therefore this judgment will deal mainly with the alleged trust, although the issues concerning setting aside the transfer of the land in question, will be described to completed the whole picture.

The appellant was the wife of the respondent. In the course of their marriage, the respondent acquired a farm LR number 10727 known as Kiringele farm in 1967. The purchase of the farm was financed by the Standard Bank and The Agricultural Finance Corporation, these two loans being secured by charges on the farm. The respondent had been a Member of Parliament but in 1971 he was convicted of sedition and imprisoned for a period of 9½ years. He was released at the end of 1980. The appellant continued to look after the family and the respondent's property in his absence. The question arose how the appellant should do so. The Bank began to press for the payment of the capital and interest. Especially when the payment fell into arrears due to a drought. The respondent made out a power of attorney to, but it still appeared necessary for the farm to be transferred into her name, for the purpose of taking up a further loan from the AFC in order to payoff the Standard Bank. It was thought that in this way the farm could be saved. The respondent did not wish to transfer the farm to his wife's name. We suggested two alternatives. One was that the farm should be transferred in their joint names, and the second was that the wife should sell off the cattle to pay of the Bank. It was found at the trial that neither of these alternatives was practicable. Apparently the organizations concerned did not wish to do business with the respondents name upon the documents involved. Secondly it appears that the drought had prevented the sale of the livestock. So the situation was that the appellant asked her husband to transfer the farm into her name alone, and in effect to trust her to look after his affair in his absence. In 1975 (it seems to be the 26 March 1975 the execution seems to have been the 24 May 1974 or 1973) the respondent transferred the whole farm to his wife 'by way of gift' It seems that the parties grew apart. And when the respondent was released as he says in October 1980, he and his wife were unable to resume their marriage. Shortly there after the wife left and it seems that good deal of property was taken over by her. But any claims to the moveable property which were in fact included in the plaint, which the respondent brought on the 5 March 1985, were ruled by the Learned Judge as barred by limitation. There was no appeal and that matter rests there. The appellant however, claimed the farm as her sole property and that the respondent contested. In his plaint he sought to set aside the deed of gift on grounds of duress, misrepresentation, or undue influence, on the basis of an unconscionable contract and on the other hand the respondent claims that the appellant held the land on trust for him. He therefore claimed it back.

One of the difficulties, which the Learned Judge faced, was that the plaint was not a model of accurate pleading, and indeed a number of important dates were missing. But I think it can be said that the Learned Judge was within his rights to hold that the trust alleged could only have been broken after the respondent came out of the prison. The reasoning for this conclusion will become clear as the judgment proceeds.

Now Mr Lakha contends that the Learned Judge could not come to the conclusion that the appellant held the land on a resulting trust for the respondent. The Judge had held that on a consideration of the acts and declarations of the parties, both before and at the time of the execution of the transfer, he was led to the inescapable conclusion that the presumption of advancement was rebutted. Although the respondents evidence was to very satisfactory and much of the had to be disbelieved, the Learned Judge was satisfied that the respondents reason for executing the transfer was to enable a loan to be obtained from the AFC and thus save the farm from being sold by the Bank. Before the drought the milk income was able to service the loan, but there after other means had to be found. The respondent had suggested a sale of the livestock or transfer to himself and the appellant; but neither of these things obtained approval. The respondent was told that the authorities did not want his name in the deed. The Judge did not believe that that transfer had been signed by the respondent, because he had been induced to do so by any improper, means, neither duress, misrepresentation, fraud or breach of a fiduciary relationship, Nor did he believe that there had been a prior promise to re-convey the property. He thought that husband and wife had expected that by operation of law there would be implied a resulting trust in favour of the plaintiff. But in order to put things right, if the appellant was bound to re-convey the property to the respondent the latter could not complain if it were encumbered with the loan that the respondent had made possible. Consequently the respondent had to indemnify the appellant against any personal covenants, under which she was liable in connection with the loan.

To begin with, Mr Lakha complained that no resulting trust had been pleaded, or indeed any trust (see paragraph 4 of the defence.) It was an express trust and paragraph 8 of the plaint was not apt for laying the foundation of a claim under a resulting trust. According to Mr Lakha there should have been averments that there was no intention of advancement or that the advancement was rebutted. There should have been particular off acts upon which there could be a rebuttal in defence. This was a matter, which he had raised during the proceedings and had taken objection, that the claim was based on an express trust and that the plaint had not been amended to make it clear. In fact the transfer was specific and expressly by way of gift.

On the basis that the wrong claim had been made, Mr Lakha relied on *Blay v Pollard and other* [1930] where Scrutton LJ gave it as his opinion that:

“Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleadings and in my opinion he as not entitled to take such course.”

That opinion was accepted by the Court of Appeal for Eastern Africa In *Gandy v Caspair Ltd* [1956] 23 EACA at 140 where it was also noted that Lord Westbury had given it as his opinion in a Privy Council case, that a case should be found in the pleadings or involved in or consistent with the case thereby made. Consequently, Mr Lakha said that as a resulting trust was not consistent with the gift there was no warrant for the finding of the Learned Judge, nor was there any other ground in the plaint which could give rise to that finding.

On the other hand, it was Mr Khaminwa's point that paragraphs 4 to 88 of the plaint sufficiently set out a case of trust and complied with Order VI, rule 8 of the Civil Procedure Rules. Moreover, if there were any lack of pleading it was an issue, which was canvassed at the trial by being referred to by both counsel and certainly became an issue permitting the Learned Judge to make a finding on it. He derived assistance from *Dhanji Ramji v Rambai and other* [1970] EA 515 where it was held that although the facts relied upon to make the appellant (in the case) liable as an apparent partner should have been pleaded, nevertheless the appellant had been prepared to meet a case of apparent partnership, as most of the evidence in support of it was elicited by the appellants across examination, and the Judge was addressed on it. Moreover, there was no prejudice to the appellant, as the displeased cause of action became an issue in the trial.

In the instant case paragraph 8 was set out as follows:

"The plaintiff further and in the alternative states that the said piece of land was transferred to the defendant in trust, for the defendant to hold the same on behalf of the plaintiff and that the plaintiff is now entitled to the legal estate in his property."

Apart from this, there was the rest of the case that the respondent/plaintiff had bought the farm solely by himself, that he had tried to save the land by two schemes which failed, and finally transferred the land to appellant in order to raise a loan to pay off the Bank. On the other hand, it is said that as it was a gift, the respondent had to add some averments to rebut the advancement.

I suppose that styles of pleading may differ, and the Mt Lakha had developed a circumstance precedent, which may have seen him through many a case of resulting trust. But on referring to *Atkin's Court Forms* (2ed) Volume 41 at precedent 18 there is an 'Endorsement on Writ of a claim for declaration of trust: resulting trust'. It describes the plaintiff's claim as a trustee of the property asking for a declaration for the property now standing in the name of the defendant and the plaintiff is held in trust for the plaintiff absolutely. Precedent 19 is an endorsement of a claim by beneficiaries, Precedent 22 is an endorsement by a beneficiary to set aside a gift to a trustee on grounds of undue influence. So far it is necessary only to allege the trust exists. The turning to the precedents of a statement of a claim, in the case, for instance, of a joint

purchase, it is suggested that it should be asserted that the shares have belonged beneficially to the plaintiff and that the defendant gets tot precedent 38, when it comes to denying a resulting trust, then the defendant shares into the joint names of the plaintiff and defendant was a gift to the defendant, and the defendant denies that the shares belong beneficially to the plaintiff alone, but admits that he had refused to transfer to the plaintiff at his request.

While I would agree with Mr Lakha that the pleading is too short and does not set out certain matters. I would not agree with him that it was wrong for the plaintiff not to set out the case against the transfer by way of gift straight away in the plaint. The plaintiff would have been better advised to gather together the facts, which he relied on to, support his alternate claim,. For instance, he could have shortly explained what occurred after he came out of prison, for example that he found that the loan from the AFC had been taken up: presumably it was being serviced; the appellant wife left after a short period and the respondent resumed possession of the farm; that he claimed to be beneficial owner, and that he had called on the appellant wife to transfer the title back to him. Then it would be up to the defendant to stress that the transfer was by gift and it was advancement by denying that the shares belonged beneficially to the plaintiff alone. The appellant could consider whether to deny refusing to transfer the property. Of course it were a case of these being no refusal but the plaintiff merely wished to wind up the trust and to make provision for the liability of the trustee with the Courts blessing, both parties could have had the scheme put before the Court for approval.

But though the pleading is short, what I wonder could it have led to other than a resulting? Mr Lakha complains that an express trust was pleaded, and yet at the same time he also complains that the transfer by way of gift was not accompanied by any collateral agreements in writing or under seal, whereby the appellant undertook to recovery the property after the respondent emerged from prison. As far as I understand his argument, it was that there was no express trust under which the appellant was to re-transfer the property (although) a promise to this effect was pleaded. What we have is a transfer by a man in prison to his wife for a lawful purpose of raising a loan to pay off the bank and an allegation of trust. The only conclusion that I can come to is, that the plaintiff was putting forward case that the transfer was not the whole story, but simply means to an end, and that was, that the appellant wife would be able to conduct the prisoner's affairs for him and preserve the property for him.

The facts became clearer after evidence was called, and after court had seen the statements made by the parties, and when it came to final submission it was clear that resulting trust had been intended. In his opening address Mr Khaminwa referred to passages in *Halsbury's Laws of England* and *Underhill on Trusts* relating to the resulting

trust. A point which must not escape attention is that paragraph 8 is in the alternative. The plaintiff is trying to say the facts upon which he transferred the property led either to setting aside the transfer, or to the re-conveyance of the trust property. After the evidence had been called, no attempt was made to show what representation were false. Duress did not lie even on the law. The plaintiff had agreed to transfer the property for obtaining a loan. Setting aside an unconscionable transfer had largely failed. What was left was the trust. It may well be that the setting aside of registered transfer, could not be accomplished except for fraud, which was not pleaded. But that has nothing to do with accepting the trust and bringing it to an end. In the circumstances, the appellant was not called to give evidence, and it was left to the legal arguments that there had been no resulting for fraud, which was not pleaded. But that has nothing to do with accepting the trust and bringing it to an end. In the circumstances, the appellant was not called to give evidence, and it was left to the legal argument that there had been no resulting trusts. Reliance was placed on *Tinker v Tinker* [1970] at 136. On the strength of this case was urged that the plaintiff did not discharge the burden of proof on him, and that it must be presumed that it was a genuine intention to give the farm absolutely to the wife. In *Tinker's* case it was held that there was a genuine gift and not resulting trust arose. It seems to me therefore that this was a case where a claim of a resulting trust was a live issue from beginning to end at the trial, and indeed as in *Dhanji Ramji v Rambai and other* the most important evidence came from the cross-examination of the respondent/plaintiff, Mr Mulwa's evidence not being questioned. I would hold therefore that the issue of the resulting trust raised in the plaint was not fully set out, but that nevertheless it was a live issue throughout the trial.

Two further questions remain. First, was the evidence sufficient to support the finding of the Learned Judge and secondly was the lack of pleading prejudicial to the appellant? I have listed the questions in this order, so as to make sure whether there was prejudice at any stage of the trial.

Mr Lakha drew attention to what he called inconsistencies between the claims made by way of gift, by stating that it was a gift that was the crucial point for the plaintiff to overcome.

On the question of a gift, there is *Hodgson v Marks* [1971] Ch 892. Mrs Hodgson who had owned the house in which she lived for sometime, executed a voluntary transfer of her house to a man called Evans who was her lodger. He was registered as proprietor of the house although it was already agreed that the beneficial interest and ownership was to remain with Mrs Hodgson. The oral agreement failed because it was not in writing. Mr Evans cheated Mrs Hodgson and sold the property to Marks. The Court of Appeal in England held that the transfer to Mr Evans was not intended to

operate as a gift, and although the express trust in favour of the plaintiff was effective, a resulting trust arose of the beneficial interest to the plaintiff. It was noted by the Russell U at 933 that the form of transfer to Mr Evans had been with the implication of gift involved in the words love and affection. So it was a case where it was taken that a gift had been indicated in the transfer. Nevertheless it was held that they both continued to live the house except that Mrs Hodgson had transferred the house to Mr Evans upon trust for herself, and that Mr Evans was the registered proprietor, holding as bare trustee of the legal estate for Mrs Hodgson who was absolutely entitled as beneficial owner. Mrs Hodgson therefore had an overriding interest in possession.

It seems to me that the above decision is of great guidance in the instant case. Even if a gift is indicated, gift may still be that the beneficial ownership is intended to remain in the person making the gift. Secondly, even if the Learned Judge were right that there was no agreement that the appellant would re-transfer the farm to the respondent when the latter came out of prison and therefore the express trust failed at this stage, nevertheless the resulting trust may still arise.

The problem then is whether there was enough evidence to support the finding that there was a resulting trust. Mr Lakha relied, as I have said, on *Tinker v Tinker* (above), and asserted that the respondent found himself on the horns of a dilemma. He could not at one and the same time allege that the farm was the property of the wife to his creditors, and then allege that it belonged to him as against the wife. The presumption is that the gift was advancement to the wife; and it does not rebut that presumption by saying that he only did it to defeat his creditors. It seems, at first sight, an extraordinary decision, having in mind that the wife was present at the meeting, where the solicitor explained the problem to husband and wife, and the wife knew that she was not being given the house at all, but it was for conveniences in case the risk of business went against them. A few weeks later wife left her husband and divorce proceedings ensued. She received the matrimonial home and the suit premises! At any rate, that case can be distinguished because there was an attempt to defeat creditors. In the present case, it was an arrangement to pay off the creditor Bank, and then incur a further loan in the way the AFC found acceptable. No one was being deprived of a possible right against the property. The Standard Bank was paid off. The AFC still had the security of the farm. After the respondent had been released from prison there could be no further stigma against him. Indeed he was very soon to become a Member of Parliament again. There is no dilemma in this case, since the respondent had been rehabilitated politically before the suit was brought, so that the AFC's objections had been removed. The AFC must have been glad to have respondent back in his own name.

It is not surprising to find that in *Heseltine v Heseltine* [1971] WLR 342 a wife transferred two sums to her husband, the first to equalise their property for estate duty purposes and the second to enable him to qualify as an underwriter at Lloyds. She was able to reclaim both sums on the basis of a resulting trust. One would have thought that the wife would have been in a dilemma for tax purposes. In *Hanbury and Maudsley's Modern Equity* (12 ed) at 248, the opinion is canvassed that the equity will refuse aid to a plaintiff who has to rely on an illegality to support his claim. The same is true of assignments in fraud of creditors, though a plaintiff may in this type of case not be refused equity's aid if the transaction deceived nobody and nothing had been done under it. It would seem that *Tinker v Tinker* is not the last word upon the subject. *Hussey v Palmer* [1972] 1 WLR 1286 represents Lord Denning's view that the constructive trust may be imposed, regardless of established legal rules, in order to reach the result required by equity, justice and good conscience. Without going that far in this case, no impropriety arose, and there was no impediment to rebutting the presumption.

No doubt the presumption of advancement applies where a husband makes a gift to his wife. But Lord Diplock warned in *Pettit v Pettit* [1970] AC 77 that the strength of the presumption in modern times may be diminished. I would add that the presumptions to be drawn in Kenya must similarly accord with the social conditions, which prevail, so as to conform to the most likely intentions of married spouses here. It seems to me that Mr and Mrs Mutiso were dealing with a period during which the husband in prison could not deal with his affairs, but yet would emerge again one day. During this temporary inability the aim would be to keep their property intact and where there were male heirs to make sure that they were not deprived of their inheritance. It would be in exceptional circumstances that the main asset would be given entirely to the wife. It would be dealt with in trust for the husband until he came back to the family. In my opinion the presumption of advancement in circumstances such as in this case would not be strong at all.

The evidence was dealt with by the Learned Judge substantially in accordance with the principles set out in *Shepherd v Cartwright* [1955] AC 43 1. In the course of his speech Lord Simonds approved a passage from *Snell's Equity* (24 ed) at 153 as follows:

"The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration. But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour."

In this case there are the interviews in prison in which the appellant asked that the farm should be transferred in her name, and the respondent replies showing that he was unwilling to do so, and his suggestions that the farm should be transferred into his

name, or that the cattle should be sold off and the proceeds paid toward the loans. There is the letter of the appellant to the Commissioners of Prisons dated 8 May 1974 to the effect that the respondent should be contacted to have it explained to him that the transfer was to enable the wife to raise a loan from the AFC to pay off the Bank. The respondent knew of the problem as the wife had mentioned it to him on her visit to him. His suggested solutions had not proved workable. This was important, as there was pressure from the Bank and AFC because repayments were not 'proper' due to the drought in the last few months. The respondent replied on 20 May 1974 though the Commissioner, that he was very sad that his proposals had not worked, and that as a result his wife was in a terrible predicament. He would like to give his consent to his wife's proposals. There was also Mr Jackson Mulwa's evidence to the same effect. The respondent had not at first wished to transfer the farm to his wife, but he had found that necessary to save the farm. The AFC had insisted on this condition and the transfer was merely for the convenience of getting the AFC loan and he was going to away for so long, that he had decided to sign the transfer.

The Learned Judge did not take into account any evidence after the transfer. Having considered the evidence a fresh in the light of the authorities above, I am satisfied that the Learned Judge was right to conclude that the transfer was merely for the convenience of raising money through the AFC loan to pay off the mortgage of the Bank.

Is that then sufficient to rebut the presumption of the gift specified in the transfer? The Learned Judge thought that it was. If there is no impediment of dishonesty, or impropriety in the way of defeating creditors, can convenience suffice. In *Marsjall v Crutwell*, [1875] LR 20 Eq 328 Sir George Jessel MR treated a case of the husband opening a joint account in the name of himself and his wife, when the husband had fallen sick, as being a case of mere convenience. He came to the conclusion that it had not been intended to be a provision for the wife, but simply a mode of conveniently managing the testator's affairs and that it left the money still his.

The later history of this case is well set out, if I may say so with respect, in *Re Figgs* [1968] 1 All ER at 1009 *et see Marshall's* case has been distinguished according to different circumstance, but it has not been overruled. In my opinion such convenience as Sir George Jessel explained is a relevant factor. It was surely the summary of this case. I think that the Learned Judge was right to rely upon it.

There is the general consideration that the result reached must be fair. Two factors sometimes arise which may have an indeterminate effect, but which in proper circumstances, may be taken into consideration. They are the degree that the donee took part in the negotiations for the transfer, and the effect on other parties. In this case

the appellant knew very well that the respondent would only transfer the farm for its management. His attempt to find other solutions and his final agreement showed the appellant that it was not a settlement on her outright, but to save the farm until the respondent came out of prison. It was a temporary measure. Secondly, no one was deceived by the arrangement. The wife carried out the arrangement. In all the circumstances it was fair to imply a resulting trust. The only sad aspect is that the parties have parted company. But no doubt provisions will be made for them in the ensuing proceedings.

In these circumstances, I would agree with the Learned Judge that there was a resulting trust to be implied in this case. But I have said earlier that I have to observe whether the lack of pleading had a prejudicial effect on the appellant's situation at the trial. There is, the aspect that objections were taken. The Learned Judge might have been more careful in answering the Chamber Summons asking him to strike out some of the allegations as showing no cause of action. There never turns a case of duress as a matter of law. As it turned out no reliance was placed on misrepresentation. Had the contest been narrowed on these grounds as well as limitation, a much clearer picture would have emerged as to the case the respondent was putting before the Court. But there was only an appeal on limitation. Moreover when that ruling was given, and the question of trust was held not to be time barred, the appellant could very well have sought to clarify the issues by interrogatories before the trial. Of course of Court has the benefit of hindsight, but it seems to me that the matter was not as contradictory or inconsistent as the appellants approach would indicate. In my opinion there was a clear contest as to whether the transfer could be set aside as unconscionable, or the farm returned under a trust on the whole, as the nature of the transfer for the purposes of management was quite simple, I do not think that there was or could have been any prejudice, even if appellant did not give any evidence.

In those circumstances I venture to think that the Learned Judge came to the correct conclusion.

There remains the issue as to limitation. On the evidence of the respondent, the appellant did not transfer the farm, when he came out of prison. Supposing that to be October 1980, and that was the earlier moments that the respondent could have expected there re-transfer on his evidence, then as the plaint was brought on 5 March 1985 it was brought within time, in accordance with section 20(2) if the Limitation of Actions Act. Where the plaint is not entirely clear and it is not certain that the claim is barred, it is better to allow the facts to emerge at the trial.

On the question of costs, first on the application, and secondly on the main case, I agree with Mr Lakha that the respondent should pay all the costs both here and below, since the respondent was indistinctly put forward. Otherwise I think that the

consequential orders suggested by the Judge ought to stand, except that there should be added a right to apply to the Court for direction I would therefore dismiss the appeal with the orders suggested above. As Gachuhi JA Masime acting JA agree, it is so ordered.

GACHUHI JA: Having read the judgment prepared by Platt JA draft form, I am entirely in agreement with it. The position of the law as it stands in Kenya today is clearly stated therein.

My emphasis is on the doctrine of advancement or as it is known as ‘gifts’. Such advancement should be clear from the time of inception. It must be free from any consideration such as for defeating creditors. But where there is a rebuttal evidence that it was not the intention of the donor to make such a gift any advancement must be held on a resulting trust, the donor retaining the legal ownership and the transferee must retransfer the property to the donor at the donor’s request.

In this appeal, the respondent never intended to transfer the land to the appellant absolutely. There is evidence on record that the respondent gave a power of attorney to the appellant to deal with the property for the time he was in prison. The appellant being not satisfied with the powers contained therein wanted the property to be transferred to her entirely. She visited him in prison and discussed the matter. The idea was not acceptable to the respondent but the respondent had an alternative idea of selling cattle to clear the bank loan or the property be transferred in their joint names.

The appellant was opposed to the respondent’s idea and appear to have said that the AFC will not deal with the property when it remained in the name of the respondent as the Government was not going to have it. Whether that was true or not, it remains that even at that juncture the respondent was opposed to the idea of transferring the land to the appellant. Further attempt to persuade the respondent to transfer the land was made by Mr Jackson Mulwa the then advocate for the appellant.

In an hour’s persuasion at Naivasha prison Mr Mulwa conveyed a promise of re-transferring the land back to the respondent when he completes his term of imprisonment. All the same, the respondent would not accept the persuasion and assurance.

Further attempt was made by the appellant on her letter to the Commissioner of Prisons to persuade the respondent to transfer the land to the appellant. This was followed by her several visits in connection with the signing of certain documents.

In this evidence, it does not appear that the respondent was ready and willing on his own free will to transfer the land to his wife. He eventually agreed to do so to raise

the loan on probably the promise made that the land will be retransfer back to him when he came out of prison.

This, evidence, in my view is capable of rebutting any presumption of advancement to the appellant. The respondent transferred the land to the appellant to be held in trust for him and to enable her raise money to clear the debts and property manage the farm. There was no absolute transfer as a gift to the wife. The words 'as a gift' may have been inserted in the transfer only for convenience since there was no other consideration. A resulting trust was created in the transfer. For a presumption of advancement to be inferred, the intention of the parties must be clearly untainted with any irregularity fraud or duress. I too would dismiss this appeal. I accept the proposed orders suggested by Platt JA that this court should make.

MASIME AJA: The facts of the case from which these appeals arise are clearly set out in the judgments of Platt and Gachuhi JJA which I have had the advantage of reading in draft. The appeals have been consolidated and heard together although the first challenged the ruling of the superior court on the issue of whether or not the causes of action pleaded were time barred and the second attacks the superior court's finding of a resulting trust in favour of the respondent in respect of the suit premises.

Having heard all the submissions in the appeal it is abundantly clear to me that the gift made by the respondent to his wife the appellant was not absolute: it was strictly for the purpose of the management of the respondent's affairs by the appellant during his prolonged absence in prison; and, it was the last desperate alternative to his earlier proposals which had proved unworkable. The appellants' Learned counsel seriously attacked the plaint filed herein which I would agree was not model one and almost failed to bring out the causes of action but taking account of the entire transaction and its surrounding circumstances, I am satisfied that the Learned trial Judge correctly constructed a resulting trust there out. The evidence clearly ruled out presumption of advancement in favour of the appellant wife.

In any case as the respondent had male children who would be potentially entitled to inherit the suit premises. It is unthinkable that the presumption of advancement would hold unless clearly set out in all the circumstances. There was evidence that the purpose of the so-called gift was to obtain loans and that loans were indeed obtained by the appellant. To hold that a court on such facts should not find a trust by operation of the law would be to enable the appellant or spouses in her position to take a fraudulent advantage of the misfortune of other husbands. In view of the finding of a resulting trust by the trial court, the issue of limitation does not arise as then follows the action based on trust was filed within time. Section 20(2) of the Limitation of Actions Act.

In the result, I respectively agreed with Platt and Gachuhi JJA that both these appeals should be dismissed with costs. I also agree with Platt JA's proposed order on costs in the trial court.

NJOKI v GACHINGIRI [1997]

HIGH COURT OF KENYA AT NAIROBI

HAYANGA J

Date of Judgment: 1997

Case Number: 5798/89

SOURCED BY: LAWAFRICA

CITATION: [1989] LLR 17 (HCK)

Importance

The issue of trust in this case was less daunting than in *Wanjiku v Mutiso* because there was no deed of gift between the spouses. Still, the property was acquired by the wife from her moneys but conveyed into the name of her husband. The decision clarifies the right of an equitable owner of property in relation to the land register.

[1] *Family law – Property – Purchase by wife – Property registered in husband's name – parties living separately – Whether a trust can be implied – Whether a trust can defeat the interest of the registered proprietor of land.*

Editor's Summary

The plaintiff married the defendant in 1955. In 1959 she negotiated to buy some property and the parties each paid the initial deposit. The defendant subsequently deserted the home in 1963 and went to live in another part of the country. In 1970 the wife completed paying for the house but had it registered in her husband's name because she had no identity card. The plaintiff brought this suit in 1989 by originating summon praying for a declaration that the suit premises was held by her husband in trust for her. Subsequently, in 1993, the husband moved back to the suit property with his two other wives and sixteen children. On the question of whether a trust would be implied to alter the ownership of the land,

Held:

1. A resulting trust would arise by operation of law where property is purchased in the name of a person without any intimation that he is to hold it in trust but the retention of the beneficial interest by the purchaser is presumed to have been intended and is held to be equitable. *Green v Carl* [1877] 4 ChD 882, *Halsbury's Law of England* (3 ed) Volume 38 at 861 adopted.
2. Section 28 of the Registered Land Act does not defeat the interest of a beneficiary against the registered trustee. The beneficiary remains the beneficial owner of the property and would be entitled as against the trustee to have rectification of the

register. *Zephania Nthoga v Eunice Nthoga and another* High Court civil case number 1949 of 1976 followed.

3. The wife was therefore entitled to registration as the owner of the suit property.

Application allowed.

Assessment

The Judge in this case, unlike many of his predecessors, did not assiduously avoid the mention of the land statutes in Kenya. He actually discussed the effect of section 28 of the Registered Land Act and concluded that it does not defeat the interest of a beneficiary against the registered trustee. Clearly, the Judge does not give the equitable owner any interest as against a *bona fide* transferee of the property

Judgment

The plaintiff came to this court through Originating Summons dated 14 December 1989 filed on 8 December 1989 asking the Court to declare that a piece of land known as Inoi/Kamondo/639 registered in her husband's name is held by the husband in trust for her and that she is to be registered as the sole proprietor thereon and that the Court should direct a transfer to be effected in her name.

Although there were affidavits the parties opted to give oral evidence and in her evidence the plaintiff said she was wife to defendant having married him in 1955, but that since 1963 there was a *de facto* separation that in that the defendant deserted and went to live in the Rift Valley. She said they had one son who died in 1986 after marriage leaving a widow and three grandsons.

She said that sometimes in 1959 she negotiated to buy the suit land from one Chimba Njeru and they both paid initially KShs 1 000 but they took possession pending finalisation of the sale. Now after the husband left for the Rift Valley the plaintiff sought to finalise the deal around 1970 but by this time, the vendors Chimba Njeru and his son raised the price to about KShs 10 430 which the plaintiff paid together with other expenses all amounting to KShs 12 500 although she was the one who attended the Land Control Board, she nevertheless had the land registered in his name because women could not hold land in their names, they had no Identity cards. She built a house for her son on this land.

(The Learned Judge reviewed the evidence).

On this evidence, it is an inescapable conclusion that the plaintiff paid for the purchase price of this property.

As to why the title deed came out in the name of the defendant. I accept the explanation by the wife that as at that time within the Kikuyu community, a woman could not hold land in her sole name especially a married woman but more believable was that as at that time, she had no Identity card as women were not supposed to have any.

Defendant did not controvert this assertion by the plaintiff and besides, the plaintiff, the Assistant Chief PW4 and PW3 corroborated this fact.

The second issue which is of law is whether the plaintiff should be regarded as a beneficial owner, but the question is, whether there is a trust. Trusts are either express or statutory or imposed by operation of law. *Halbury's Laws of England* (3 ed) Volume 38 paragraph 861 says:

“A resulting trust is a trust arising by operation of law in the following cases ...
(3) where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended and is held to be equitable.”

In such a state, the land should revert or result to the purchaser of the property in this case, the plaintiff.

Under section 28 of Registered Lands Act Chapter 300, rights of a registered proprietor can only be defeated by registered lease charge, encumbrances, conditions and restrictions shown in the register and overriding interests, but the Act gives exception in proviso to section 28 it is provided that:

“Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Under section 126(1) of the Registered Lands Act Chapter 300, it is provided as follows:

- (1) A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and if so described, shall be registered with the addition of the words “as trustee,” but the Registrar shall not enter particulars of any trust in the register.
- (3) Where the proprietor of land lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities rights or interests to which it is subject by virtue of the instrument creating the trust, but for the purpose of any registered dealings, he shall be deemed to be the absolute proprietor thereof and no person dealing with the land a lease or a charge so registered shall be deemed to have notice of the Trust nor shall breach of the Trust create any right to indemnity under this Act.

In this court, Muli J held in *Zephania Nthoga v Eunice Wanjiru Nthoga and Samuel Njeru Nthoga* High Court civil case number 1949 of 1976 that in spite of registration having been done in the second defendant's name nevertheless the land belonged to the plaintiff as beneficial owners.

A comparable situation although only for comparison, obtains in common law where a wife hands over to her husband property belonging to her without any intention of making a gift of it to him. He is a trustee of it to her unless there is contrary intention. See *Green v Car* LLL [1877] 4 ChD 882 *Halsbury's Laws of England* (3 ed) Volume 38 paragraph 870.

I, therefore, hold that the defendant held this property for the plaintiff as trustee. I also direct that the same be transferred to the plaintiff and be registered in the name of the plaintiff and until this is done, the plaintiff's caution be retained on the title until this is done.

Cost of this application be to the plaintiff.

HOUSING FINANCE COMPANY OF KENYA LTD V KIMERIAH AND ANOTHER [1998]

COURT OF APPEAL OF KENYA AT NAIROBI

OMOLO, SHAH AND BOSIRE JJA

Date of Judgment: 17 June 1998

Case Number: 214/96

SOURCED BY: LAWAFRICA

CITATION: [1996] LLR 471(CAK)

Importance:

This is a clear decision of the Court on the issue of a spouse's equitable interest in matrimonial property vis-à-vis the legal of a duly registered chargee.

[1] Family law – Property of spouses – Property registered in husband's name – Property subject to charge – Whether chargee can be restrained from exercising statutory power of sale until a determination of the wife's interest therein

[2] Land – Mortgage – Property of spouses – Property registered in husband's name – Property subject to a charge – Whether chargee can be restrained from exercising statutory power of sale until a determination of the wife's interest therein

Editor's Summary

The wife in this suit took out an Originating Summons in 1993 seeking a declaration that a certain property registered in the sole name of the husband was the joint property of the spouses. She then brought an application within the suit seeking joinder of H, the chargee of the property, in the suit, and orders restraining any dealing with the suit property pending the determination of her interest in the property, which was acquired during the course of her marriage. The trial Judge granted her applications ordering joinder of the chargee and an injunction restraining any dealings in the property.

Held: Any suit filed by the wife under section 17 of the Married Women's Property Act of 1882 is for a speedy resolution of the issue of what share, if any, the wife is entitled to in the matrimonial property. That issue can be of no concern to the chargee, and there was no basis to join it in these proceedings. The chargee's right to exercise its statutory power of sale cannot be impeded by these proceedings.

Assessment

The court resolutely dismissed the attempt of the wife to join the chargee on the ground that she had no possible cause of action the charge. The court duly insisted that a legal interest should not be defeated by equitable claims. However, the Court's finding of misjoinder may not stand a close reading of section 17 which foresees the possibility of a third party initiating or possibly joining, the proceedings. Probably the Court should have tried to analyse better the areas of law concerned property equity and trust.

Judgment

Sometimes in 1993 Faith W Kimeria (hereinafter referred to as the wife) filed a suit against Harrison C Kimeria (hereinafter referred to as "the Husband"). In that suit (High Court civil case number 873 of 1993) filed by way of an Originating Summons under section 17 of the Married Women's Property Act, of 1882 of England (an Act of general application in Kenya) the wife seeks orders against the husband for a declaration that immovable property known as number 7763/6 situates in the city of Nairobi and registered in the sole name of the husband is owned jointly by her and the husband. She also claims that the husband is registered and owns the said property for the benefit of himself and the wife as trustee. She also seeks further orders for registration of the said property in their joint names.

By Chamber Summons taken out by the wife in that suit she sought orders that the appellant (Housing Finance Company of Kenya Limited) be joined in those proceedings as a co-defendant and that pending the hearing and determination no that suit the husband and the proposed defendant (the appellant) be restrained, stopped and prevented from selling, transferring, charging, alienating, disposing of or in any other way parting with the said property. In the same application the wife sought orders that pending the hearing and determination of that suit, the defendants be stopped, prevented and restrained from evicting or ejecting the wife from or interfering with her quiet possession and occupation of the said property.

The wife's application come up for hearing before the superior court (Khamoni J) and the Court granted the orders sought by the wife despite objections by type appellant. It is against these orders that the appellant now appeals. The appellant's stand in the superior court was that the provisions under which the orders were sought did not apply, that there was no cause of action against the appellant at all and that the appellant's statutory power of sale could not be curtailed by such an application.

The Learned Judge said in his ruling: From what has between brought to my attention during the hearing of the chamber summons there appears to be some

straining in the matrimonial relationship between the plaintiff and the defendant, her husband. The suit property is registered in the sole name of the defendant and it would appear that the property was mortgaged to M/s Housing Finance Company of Kenya Limited (HFCK) by consent of the plaintiff and the defendant.

Payments of the loan are in arrears and as a result the HFCK is threatening to sell the property in the exercise of the Company's statutory power of sale. The ground upon which the wife sought the addition of HFCK as a second defendant in the suit (the defendant being the Husband) boils down to saying that if HFCK were to be brought in as a defendant "all the parties will be enabled to realize their fair rights.

Order I, rule 10 of the Civil Procedure Rules provides for addition of a party to a suit so that its presence before the Court may enable the Court to effectually and completely adjust upon and settle all questions implied in the suit, or to enable the Court to determine the real matters in dispute.

Now the matters in dispute in the suit in the superior court are clearly between the husband and wife. These disputes have nothing to do with HFCK who is merely the charge whose interest simply is to realize the loan. We see no basis whatsoever, in this case, upon which HFCK could be implanted in the proceedings. Clearly the wife seeks to obtain more time by virtue of the application so that HFCK may postpone the inevitable sale of the property and so far she has succeeded in doing so.

Any suit filed by the wife under section 17 of the Married Women's Property Act of 1882 of England is for a speedy resolution of the issue of what share, if any the wife is entitled to in the matrimonial property; that issue can be of no concern to the charge.

The application, which was before the superior court, in the circumstances of the case, was really an abuse of the process of the Court. The relevant circumstances are that the wife knew that the property was charged to HFCK; that she had herself paid some of the instalments; that arrears had mounted up giving rise to the right of HFCK to exercise the statutory power of sale; that the wife knew of the arrears.

Despite all these undisputed facts the Learned Judge not only ordered HFCK's to exercise the statutory power of sale that the wife knew of the arrears. Despite all these undisputed facts the Learned Judge not only ordered HFCK's joinder as a defendant in the suit but proceeded to grant an injunction restraining HFCK' from selling the property pending the hearing and determination of the suit on the premise that the wife had a *prima facie* case with probability of success against her husband; she has no cause of action at all against the appellant.

The upshot of all this is that this appeal must be and is hereby allowed. The orders made by the superior court on 19 May 1995 are set aside in their entirety. The appellant is dismissed from the suit. The appellant will have its costs of proceedings in the superior court and costs of this appeal which shall be payable by the first respondent. As the second respondent had nothing to do with what transpired in the superior court and this court there will be no order of costs as against him.

NDUNGU V NDUNGU [2000]

COURT OF APPEAL OF KENYA AT NAIROBI

KWACH, SHAH AND O’KUBASU JJA

Date of Judgment: 14 July 2000

Case Number: 2/00

SOURCED BY: LAWAFRICA

CITATION: [2000] LLR 3497 (CAK)

Importance

The decision herein was made just two months after *Kamore*. The wife sought protest herself by bringing a declaratory suit to determine her share in property once her husband decided to enter into another union. The trial Judge decided to apply the Married Women’s Property Act. The case is importance because it directly deals with the interaction between the ordinary principles of trust and the powers of a court under a section 17 application.

[1] Family law – Property – Declaration of trust – Action filed by plaintiff – Whether proper procedure to determine share of suit lands between spouses.

[2] Family law – Property – Parties still married – Suit seeking declaration of trust – Whether trial Judge had jurisdiction to alienate suit lands between the spouses during their unbroken coverture.

Editor’s Summary

The parties were married under customary law in 1952. In 1993, the husband went through a ceremony of marriage at the registrar’s office with a third party. This triggered the suit by the first wife seeking a declaration that the husband held certain properties in trust for himself and the wife and a perpetual injunction restraining any dealing in the property during the wife’s occupation. No divorce was contemplated, but the wife founded her claim on her contribution to the above properties. The trial court held that the Married Women’s Property Act would apply in the absence of customary law. The court found that there was contribution and this entitled the wife to two-third and one-third share respectively in the two properties. The husband sought review of the order on the ground that it was made under the wrong provision of law. The application for review was rejected and the husband appealed against the decision declining review.

Held:

1. There was an error apparent on the face of the record: (a) when the trial Judge proceeded to treat a claim under an implied or resulting trust as a claim made under section 17 of the Married Women's Property Act; (b) when the Judge divided the suit lands as if he was dealing with a succession matter when the parties were still alive; (c) when the Judge decided to make a finding based on section 17 of the Married Women's Property Act. The prayer for review should therefore have been granted.
2. The trial Judge had no jurisdiction to alienate suit lands between spouses during their lifetime or unbroken coverture.

Appeal allowed.

Assessment

The decision is interesting in that it holds by implication that there would be no basis for an application under section 17 of the Married Women's Property Act without a concurrent matrimonial cause either for separation or divorce. This decision of the Court could be applauded for fostering family solidarity. However, it has little foundation in law and would probably spawn unintended long-term effect. What happens when a wife chooses to separate from her husband temporarily: Must she bring proceedings for separation if she is to get access to property?

Family law of property could potentially affect diverse areas ranging from land, mortgage and tenancy law to company law, tax law and even bankruptcy law. If for example a husband wants to determine what proportion of his company shares is held beneficially for his wife,⁴³ or what portion of income from his business should be taxed on his wife, wouldn't he be entitled to bring summary proceedings under section 17 MPWA? What of the possible scenario where the husband is declared bankrupt: wouldn't the wife or even the husband's trustee in bankruptcy be entitled to bring proceedings for a determination of the property which belongs to either spouse, for example in relation to households goods?

Ndungu also implies that under a claim for constructive trust, the Court is not entitled to consider the provisions of the Married Women's Property Act. Aside from

43 See *Disbrowe v The Queen* (Canada, O'Connor, 30 October

2000 <<<http://decision.tcc.gc.ca/en2000/html/2000tee98448.html>>>. (The Court considered the question of whether the husband should be taxed on the whole capital gain in Disbrowe Ltd or whether part of that capital gain should be taxed on the wife on account of her beneficial interest in the property. In this case the Court decided in favour of the husband and taxed part of the capital gain on his wife). It is however admitted that Kenyan tax law would currently not give rise to the need for such determination due to the provision that all the wife's income, except employment income, would be taxed on her husband.

the procedural implications of a section 17 application, it seems clear that the principles to be applied are almost identical. Whether one originates proceedings by Originating Summons under section 17 MPWA or by a plaint or summons for a declaration of trust, the same principle that contribution should be proved by evidence and that a resulting trust would not be lightly imputed apply.

The wife in this suit had evident premonitions that the husband's extra-marital relations would prejudice her existing property rights. She therefore sought to have them determined. The court's decision to dismiss the suit was therefore warranted. It however showed that our court may still not have grasped, this late in the day, the application of the doctrine of trust in deciding questions between spouses as to the beneficial ownership of property acquired during coverture.

Case referred to in judgment

East Africa

Ayoub v Standard Bank of SA [1963] EA 619

Judgment

The appellant Peter Ndung'u is the husband of the respondent Sophia Watiri Ndungu. The marriage between the two was celebrated in 1952 in accordance with the ceremonies prescribed by Kikuyu customs. On 23 August 1993 the appellant married Mary Wanjiru Njogu at the registrar's office, Nairobi. When he went through the ceremony of marriage at the registrar's office he was described as "married under customary law."

It would appear that the appellant's second marriage triggered off the proceedings in the superior court. The respondent sued him claiming the following reliefs:

- “(a) A declaration that the defendant (the appellant here) holds the properties comprised in the parcels of land known as Ngong/Ngong/3949 and Kajiado/Ngong/432 in trust for himself and the plaintiff (the respondent here) as beneficial owners in equal shares;
- (b) An injunction perpetually restraining the defendant whether by himself, his servant or agents or otherwise howsoever from transferring, alienating, selling or otherwise disposing of the said properties or interfering with the plaintiff's peaceful occupation thereof;
- (c) Costs of this suit;

(d) Any other further relief deemed fit.”

It is common ground that the parties are still married and no divorce is contemplated. It is also common ground that the respondent occupies one of the said parcels of land, namely Kajiado/Ngong/432 and that the second wife occupies a parcel of land known as Ngong/Ngong/3949. Parcel number 432 is about 10 acres whereas parcel number 3949 is about 5 acres. The claim by the respondent against the appellant was purportedly founded on allegations to the effect that the two parcels of land were acquired with contribution from both the appellant and the respondent.

The cause of action as pleaded in the plaint is one which is available to a wife under section 17 of the Married Women’s Property Act of 1882 of England in appropriate circumstances. But the claim in the prayers by the respondent is based on the concept of an implied or resulting trust.

After hearing the suit the Learned Judge ruled in favour of the respondent and ordered as follows:

“The case ought to have in my view, been brought under the provisions of Married Women’s Property Act 1882 and as there was no other Customary Law proved before me to govern this case I must take cognisance of under the Judicature Act Chapter 8. That will be the Order of the Court. No order as to costs.”

Obviously the Learned Judge was referring to the Married Women’s Property Act of 1882 of England when he talked of written law. This is clear from his reference to the Judicature Act.

However, earlier on in his judgment the Learned Judge made a finding of trust. He said:

“I agree on the evidence that the plaintiff must have contributed to the purchase of the plots in question directly or indirectly. Accordingly the plaintiff is therefore entitled to a declaration that the defendant holds the plots in trust for himself and the plaintiff in proportions one to two in respect of Ngong/Kajiado/432 and in the proportion of two to one in respect of Ngong/Ngong/3949 respectively.

The reason is because the first plot was bought really by plaintiff and PW2 Joseph Muroga Kivitu who says so in his evidence on this matter supporting the evidence of PW1 who said he really paid KShs 5 000 plus transfer money while the purchase price was KShs 450 per acre so that at the acreage of 10 acres the total amount would be KShs 4500.

The plaintiff then paid the entire amount of purchase price and coupled with this is the fact that the plaintiff is living there and according to her testimony her contribution towards the children’s education was almost single handed.

I think two to one is a good ratio here particularly when the defendant also the defendant also admits that he holds those plots for the benefit of his children.”

The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the articles to create a trust must be clearly determined before a trust is implied. See: *Ayoub v Standard Bank of SA* [1963] EA619 at pp 622-623.

However, the judgment of the Learned Judge was not appealed against. Instead the appellant opted to obtain a review of that judgment under Order XLIV of the Civil Procedure Rules and section 80 of the Civil Procedure Act. That application was filed by another firm of advocates M/s Wambugu and Company on 5 June 1999. The grounds in the affidavit in support of the application. These were:

- (1) that there was an error apparent on the face of the record and
- (2) that the suit was brought under wrong ‘legal provisions.’ The appellant did not seek the said relief under the general provision in section 80 of the Civil Procedure Act, that is, invoking the power of court to make such orders as it thought fit.

It is clear however that the Learned Judge decided the suit on the basis of the remedy as contemplated by section 17 of the Married Women’s Property Act of 1882 of England. It was clearly an error on the face of the record when the Learned Judge proceeded to treat a claim made under an implied or resulting trust as a claim made under section 17.

It was also an error apparent on the face of the record when the Learned Judge proceeded to divide the suit lands as if he was dealing with a succession clause the appellant is still alive. We note that all the respondent’s children, by the appellant, are adults and the issue of children’s interest apparently was brought into the suit as a red herring.

It was also an error apparent on the face of the record when the Learned Judge said that although there was no evidence of customary law relating to division of properties amongst spouses where can be none when the spouses are alive he was obliged to make a finding based on section 17 aforesaid.

The remedy of review of a judgment or order is available to an applicant if there is a mistake or error apparent on the face of the record and as we have pointed out the Learned Judge did fall onto such manifest errors that it cannot be said that the remedy of review was improperly invoked.

We would therefore allow this appeal, set aside ruling and order of Hayanga, J and grant the order for review. Under Order XLIV, rule 6 of the Civil Procedure Rules once an application for review is granted, a note to that effect is to be made in the register and the Court is enjoined to re-hear the case or make such order in regard to re-hearing as it thinks fit.

We do not think it would be worthwhile to remit the suit for re-hearing. We have powers under section 3(2) of the Appellate Jurisdiction Act, to make such orders as the superior court could have made when we are properly seized of an appeal. In the exercise of those powers we find and hold that the Learned Judge had no jurisdiction to alienate suit lands between spouses during their lifetime or unbroken coverture and he ought to have dismissed the suit.

The upshot of all this is that this appeal is allowed. The judgment of the superior court dated 10 May 1993 is set aside and substitute by an order dismissing High Court civil case number 4936 of 1993.

As this is a family dispute we make no orders as to costs.

KITALE V KITALE AND ANOTHER [2001]

HIGH COURT OF KENYA AT NAIROBI

MULWA J

Date of Ruling: January 2001

Case Number: 1219/00

SOURCED BY: LAWAFRICA

CITATION: [2000] LLR 968 (HCK)

Importance

This case once again serves to illustrate the interaction between the equitable property rights of the contributing spouse and the rights of other third parties. A similarly scenario was confronted in *HFCK v Kimeria* where the wife sought to restrain a chargee from exercising its statutory power of sale. The court in this case distinguished *Kimeria* and reached a different conclusion allowing the wife six months to exercise her equity of redemption!

[1] Family law – Property – Owned by husband – Charged to second defendant – Wife seeking right to redeem the property – Wife claiming equitable interest through direct and indirect contribution – Whether wife could obtain injunction against chargee.

Editor's Summary

The parties solemnised their marriage in 1985. In 1995, the husband purchased the matrimonial home, financed in part by a charge in favour of C. The husband left home and the parties eventually petitioned for divorce. The wife filed suit by originating summons against her husband's mortgage obligations and praying that the chargee be restrained in the interim from disposing the suit property. She obtained an injunction but it subsequently expired. While that suit was still pending, she filed this redemption action seeking to establish her rights over the property. She sought a declaration of her right to occupy the matrimonial home interests in the property and a declaration of her right to redeem the mortgage. The wife's claim was that she had regularly contributed to the repayment of the mortgage amount when they fell into arrears.

Held:

1. It is trite law that where a spouse buys property intended for common use with the other, it cannot *per se* give the other spouse an interest in the property. Where the property is purchased and conveyed into the name of one spouse who did not evince an intention that the other spouse should share in the property, the question of whether the other spouse has a beneficial interest in the property is dependent on the law of trust. *Gissing v Gissing* [1970] 2 All ER 7 adopted.

2. In this case, the wife had made both direct and indirect financial contributions in the property. The inclusion of her name in the paying-slips also established an intention by the husband that the wife share in the beneficial interest of the property. The husband was holding the wife's interest in trust for her.
3. The mortgagor and all persons having any interest in the property subject to the mortgage or liable to pay the mortgage debt can redeem. Once the equitable right to redeem arises, such a person having right to redeem may bring redemption proceedings. *Pearce v Morris* [1969] 5 Ch App 229 adopted; *HFCK v Kimeria and another* civil appeal 214 of 1996 distinguished.
4. In this case where the wife had made direct and indirect contribution to the property that is not easily assessed, the only possible solution is equal division of the property. *National Provincial Bank Limited v Ainsworth* [1965] 2 All ER 472 adopted.
5. Since the wife as seeking to redeem the property, there was no justification for the chargee to exercise its statutory power of sale. *Uhuru Highway Development Limited v Central Bank of Kenya and other* [1995] LLR 2177 (CAK) distinguished. *Cheshire and Burns, Modern law of Real Property* (10 ed) at 626 considered.

Redemption action succeeds. Plaintiff ordered to pay charge the amount due in full within 6 months

Assessment

Justice Mulwa's decision is remarkably clear and logical. He analyses various authorities and forcefully makes out a case to distinguish the decision of the Court of Appeal in *HFCK v Kimeria* from application in this case. The conclusion of the Court, in applying Gissing, to impute a trust is based firmly on a perspicuous grasp and application of property law. The court did not stop there but went ahead to assess whether the chargee was acting equitably in denying the equitable chargor, whose ability to pay had not been questioned, from exercising the right of redemption. The court therefore granted the equitable chargor a six-months respite during which she was entitled to redeem the property by paying off the mortgage instalments in full.

It is difficult to fault the above judgment. One cannot deny that in the circumstances of this case, it is probably right for the wife to be given an opportunity to redeem the property. The evidence of the husband's request that the wife be made joint owner of the property sufficiently satisfied the evidentiary burden to impute a constructive trust for half the beneficial interest in the property in favour of the wife.

Still, it is open to debate whether the six-month period allowed the wife to redeem the property was the most appropriate taking into account that the statutory

power of sale had arisen. Under the land statutes of this country, a 3-month period has been provided for a statutory notice prior to the exercise of the statutory power of sale. It is also trite that the Auctioneer's Act 1996 requires an additional 45 days notification to be given to the chargor in such circumstance. One may therefore argue that the 60-months period was prejudicial to the chargee whose statutory power of sale had arise.

It ought not be suggested that an equitable charger should receive a greater indulgence from the Court than a legal chargor can receive under statute. A 3-months period would have been appropriate, and even then only on the consideration that the chargee had obstructed exercise of the statutory power of sale. A different ruling would amount to an adroit but mistaken side-stepping of property law and in particular the decision of Court of Appeal in *HFCK v Kimeria*.

Cases referred to in ruling

East Africa

Housing Finance Company of Kenya Ltd v Kimeria and another [1996] LLR 471(CAK)
Uhuru Highway Development Ltd v Central Bank of Kenya and another [1995] LLR 2177 (CAK)

United Kingdom

Gissing v Gissing [1970] 2 All ER 7
National Provincial Bank Ltd v Ainsworth [1968] All 1175, 1236, [1965] 2 All ER 472, 487
Pearce v Morris [1969] 5 Ch App 229
Thornborough v Baker [1625] 3 Swan 628
Walker v Jones [1866] LR IPC 50

Ruling

The applicant has filed this redemption action by way of an Originating Summons in which she is asking for orders *inter alia* to restrain the first and second defendant from alienating that property known as Nairobi Block 72/341 House number A43 situated at Onyonka Estate (hereinafter referred to as the suit property). The application is supported by an affidavit sworn by the applicant. The applicants main grounds in support of the claim are that the plaintiff/applicant had contributed towards the acquisition of the property and that the defendants allowed her to make further payments towards the repayment of the loan thereby acquiring some interest in the

property. She maintains that she is willing to redeem the property by paying the amount owing.

The application is opposed by the defendants on the grounds that the Court had made an order directing the plaintiff in civil suit number 1651 of 1996 to establish her interest in this property within a period of 3 months which she did not. That there is a suit pending in Milimani Commercial Court in which the issues canvassed in this application are the same as issues in that application and that the plaintiff is a stranger to the contract between the first and second defendants.

The defendants rely on the authority in the case of *Housing Finance Co of Kenya Ltd v Kimeria and another* [1996] LLR 471(CAK) and on the ground that the second defendant as a financier is a stranger to the matrimonial dispute between the plaintiff and the first defendant which matrimonial dispute should not act as a clog to the defendants' statutory rights under the charge.

Indeed there is a pending civil suit number 1651 of 1996 (OS) dated 5 July 1996 and filed on the same day. In that suit, the plaintiff therein and herein is seeking inter alia orders that she be assigned the mortgage obligations of the second defendant/respondent with the first defendant/respondent (the first and second defendant/respondent in this suit respectively), and an injunction restraining the defendants by themselves or their agents from seeking and/or disposing of LR number Nairobi Block/72/341 Onyonka Estate till the determination of the suit.

By a chamber summons dated and filed on the same day and brought under certificate of urgency, the plaintiff sought a temporary injunction restraining the defendants from selling the suit property pending further orders of the Court. This court sitting at the Milimani Commercial Court in High Court civil case number 1651 of 1996 (OS) gave an order on 4 April 2000 restraining the second defendant herein from auctioning the suit property for a period of 3 months within which period, the plaintiff was to establish her rights over the suit property and in default the application was to stand dismissed.

The plaintiff failed to comply with the said orders on time and needless to say the application, that is to say the chamber summons dated 5 July 1996 stood dismissed. This is not in dispute. The order was made on 4 April 2000. The grace period given expired on 4 July 2000. The present suit was brought on 2 August 2000. There was obviously a delay but it was such a delay which in my view is excusable.

The plaintiff has now brought this redemption suit. It is the defendants case that the issues canvassed in the instant suit are similar to those in High Court civil case

number 1651 of 1996 (OS) and therefore the present suit offends the provisions of section 6 of the Civil Procedure Act.

The plaintiff is now seeking to establish her rights over the suit property. Therefore of necessity, the issues may be similar to those canvassed in High Court civil case number 1651 of 1996 (OS). It is noteworthy that the plaintiff in High Court civil case number 1651 of 1996 (OS) sought orders that she be assigned the first defendant's mortgage obligations to the second defendant herein and that the defendants be restrained from selling the suit property. The pertinent orders the plaintiff is now seeking in her Originating Summons are:

1. A declaration that as against the first defendant that the plaintiff together with the Minor Children of the marriage has a right of occupation in the former matrimonial home known as title number Nairobi Block 72/341 House number A43 situate at Onyonka Estate, Nairobi.
2. A declaration that the plaintiff has a substantial legal and equitable interest in the said property as this honourable Court may determine.
3. A declaration that the first defendant has by his conduct willfully wasted the former matrimonial home aforesaid by failing to make or to continue to make any or any timely monthly mortgage repayments to the second defendant and has consequently forfeited all his interests in the said property.
4. A declaration that being a person having a legal and equitable interest in the mortgaged property the plaintiff is entitled to redeem the same.

In the supporting affidavit the plaintiff has sought to establish her rights in the suit property. The Orders sought as outlined above are in terms of the Orders made on 4 April 2000 in High Court civil case number 1651 of 1996 (OS). I am satisfied that the present suit does not offend the provisions of section 6 of the Civil Procedure Act. In any case, this matter cannot be finalized by resorting to technicalities but by dealing with the issues in dispute between the parties. Applying technicalities will only serve to delay the already protracted proceedings.

The issues for consideration are, firstly whether the plaintiff has a legal and equitable interest in the suit property and if so whether the plaintiff is entitled to redeem the mortgage property. Lastly is the issue what, if any, is the plaintiff's share in the suit property.

I shall consider these issues in that order.

It is the plaintiff's case that she contributed towards the acquisition of the suit property during the subsistence of the marriage between her and the second defendant.

The plaintiff therefore asks this court to make a declaration that she has legal and equitable interest in the suit property.

The background of this matter is that by a charge dated 5 September 1995 the first defendant charged the suit property for an advance of KShs 250 320 given by the second defendant. The first defendant and plaintiff were at the material time husband and wife respectively. Their marriage, was solemnized on the 31 August 1985 though they had been living as husband and wife since November 1982. Since the celebration of the marriage, the first defendant, the plaintiff and the two issues of the said marriage lived in the suit property as their matrimonial home until the first defendant left the plaintiff and the children of the marriage.

In July 1997 the first defendant filed a petition for divorce against the plaintiff in Divorce Cause number 56 of 1997. The plaintiff cross petitioned on 14 December 1997. The plaintiff was granted a *decree nisi* on the grounds of the first defendant's desertion. The *decree nisi* was made absolute on 16 June 2000. There was no application or orders in respect of the matrimonial property.

The matrimonial home was purchased by first defendant (ex husband) in his sole name. The purchase was partly financed by the first defendant's employers by way of a loan to him to meet the deposit requirement and the balance was paid through an advance from, the second defendant herein. The home was charged to the second defendant to secure the said advance. The repayment period was 15 years.

The repayment was mainly made by the husband. The plaintiff depones in her affidavit, that the first defendant did not contribute towards the purchase of food and other household necessities or school fees for the children save when the Juvenile Court in civil suit number PS 289 of 1995 gave an order for attachment of the 1st defendant's salary on the 19 February 1997 which was stopped in July 1997. The plaintiff depones that repayments were made on irregular basis and the mortgage regularly fell in arrears. The plaintiff on various occasions had to contribute towards the payment of monthly installments and had to frequently borrow to make repayments to prevent the sale of the house. Subsequently, the first defendant requested the second defendant to include the plaintiff's name in the title.

This was not done but her name was included in the cash paying in slips. The arrears increased leading to the house being advertised for sale on the 9 July 1996. On 9 July 1996 the plaintiff made an application by way of an Originating Summons in civil suit number 1651 of 1996 and now this suit.

It is trite law as has been expounded in *Bromley's Family Law* (ed) at page 585, that where a spouse buys property intended for common use with the other, it cannot *per se*

give the later any proprietary interest. However if either seeks to establish a beneficial interest in the property, the legal title which is vested in the other, she/he can do so only by establishing that the legal owner holds the property in trust for the claimant.

In *Gissing v Gissing* [1970] 2 All ER 7 the House of Lords held that the question whether the contributing spouse is entitled to a beneficial interest in the matrimonial house is a matter dependant on the law of trust where a matrimonial home is purchased but conveyed into the name of one spouse only and there was no agreement as to sharing of the beneficial interest in the matrimonial home and the spouse in whose name the matrimonial home was purchased evidenced no intention that the contributing spouse should have a beneficial interest therein.

I am convinced by the evidence on record that the plaintiff did contribute towards the purchase of the suit property. Even without her direct contribution I would still find that the first defendant is holding the plaintiff beneficial interest in the suit property in trust for the plaintiff. This is because she did shoulder all by herself the house keeping expenses and school fees for the children. There was also a clear intention by the ex husband that the applicant would have beneficial interest in the property as evinced by the intention to include her name in the title and the payments she was allowed to make by the first defendant to the second defendant. I do so on the authority of the holding in *Gissing v Gissing (supra)* in support of the view that there is no distinction to be drawn in law between the position where a contributing spouse makes direct contributions towards the purchase of the matrimonial home and where the contributing spouse makes indirect contribution.

In view of the foregoing, I find that the plaintiff has a beneficial interest in the suit property which interest the first defendant is holding in trust for the plaintiff.

It is the plaintiff's further case that the first defendant has willfully refused to make mortgage repayments to the second defendant and has consequently forfeited all his interest in the suit property and asks the Court to make a declaration that being a person with legal and equitable interest in the mortgaged property the plaintiff is entitled to redeem the same.

It is evident that the first defendant has not taken any step to rescue the suit property from being sold by the second defendant.

The persons entitled to redeem a mortgage property are set out in the *Halsbury's Law of England* (3 ed) Volume 27 page 232 235. The mortgagor and all persons having any interest in the property subject to the mortgage or liable to pay the mortgage debt can redeem in *Pearce v Morris* [1969] 5 Ch App 229 at page 22. It was even held that it is immaterial to the mortgagee, so far as the mortgagor's right to redeem is concerned

whether the mortgagor's title to the mortgaged property in good or bad; the mortgagee is not entitled to dispute it and an assignee of a mortgage is in the same position as the mortgagor in *Walker v Jones* [1866] LR IPC 50 at page 66. Persons claiming under a mortgagor and persons claiming possessory rights are also entitled to redeem the same.

The law as outlined in *Halsbury's Laws of England* (*supra*) at paragraph 242 is that, after the day fixed in the mortgage contract for payment of the principal sum has passed and default has been made a mortgagor has an equitable right to redeem the property. A mortgagor who desires to discharge the mortgage debt must tender to the mortgagee the full amount that is due.

Any mortgagor or any person having the right to redeem like the plaintiff herein may bring redemption proceedings. Such an action must contain whether expressly or by implication an offer to redeem as is stated in *Halsbury's Law of England* (3 ed) Volume 27 at paragraph 851).

The defendants rely on the Court of Appeal's decision in civil appeal number 214 of 1996 *Housing Finance Co of Kenya Ltd v Kimeria and another* [1996] LLR 471(CAK) in which the Court of Appeal held that any suit under section 17 of the Married Women's Property Act 1882 of England is for a speedy resolution of the issue of shares, if any, the wife is entitled to in the Matrimonial Property; that issue can be of no concern to the chargee. That is the law and the decision is binding on this court. However, in *Kimeria's* case, the dispute was between husband and wife as to the share of the property. In the instant case, the plaintiff is claiming legal and equitable interest and has been denied a chance to redeem while it is argued for the plaintiff that as a person with legal and beneficial interest who is willing and capable of paying off the arrears, she ought to be given a chance in the interest of justice to redeem. Therefore it is distinguishable from *Kimeria* case where the wife knew of the arrears but was only seeking her share of the property. In fact, in this case the wife is actually seeking a chance to take over the mortgage responsibilities of her ex husband and pay it off. Unfortunately, the second defendant has stood in the plaintiff's way towards this end. The plaintiff while she is capable of meeting the second defendants demand for payment of arrears has been shut out. At the end of the day, the second defendant can go ahead and exercise its Statutory Power of Sale.

The next issue for consideration is the quantification of the shares. This is difficult in a case like this where the spouses financial affairs were so intricably entangled. Whereas the first defendant made mainly direct monthly mortgage repayment, and it is expected he made some contribution towards the running of the homes, the plaintiff mainly indirect contribution and some direct contribution on. The only possible

solution is an equal division as the Court held in *National Provincial Bank Ltd v Ainsworth* [1968] All ER 1175, 1236, [1965] 2 All ER 472, 487. After all equality is equity. In whole the circumstances of this case, I hold that the plaintiff is entitled to half share of the suit or mortgage property.

The lender ought not harass the borrower unnecessarily when payment of the mortgage money due is possible. As shall be demonstrated the plaintiff has a legal and equitable interest in the suit property and notwithstanding the other authority cited by the second defendant's counsel, namely case of *Uhuru Highway Development Ltd v Central Bank of Kenya and another* [1995] LLR 2177 (CAK) in which Kwach JA held that a Court should not grant an injunction restraining a mortgage from exercising its statutory power of sale except under the circumstances stated in *Halsbury's Laws of England*. Volume 32, (ed) at Paragraph 725, it is my considered view that the plaintiff ought to be granted a chance to redeem. The second defendant will not suffer any detriment if this course of action is adopted. There is clearly a distinction in that plaintiff seeks to exercise his equity of redemption but second defendant is unwilling and is insisting on exercising its powers of sale.

My views are not without support. In *Cheshire and Burns' Modern Law of Real Property* (10 ed) at page 626, the Learned authors state that, in equity, the essential object of a mortgage is to afford security to the lender, and as long as the security remains intact there is no justification for expropriating the property of the mortgagor merely because of his failure to make prompt payment. I also wish to quote the words of Lord Nottingham in *Thornborough v Baker* [1625] 3 Swan 628 at 630 who stated:

"In natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money."

In the instant case, the money is there. There is evidence that the plaintiff is willing and capable of paying the mortgage debt off. I do not see why the second defendant has to insist on selling the suit property. When it will not suffer much as compared to the plaintiff whose equity of redemption will be extinguished by the sale in exercise of statutory power of sale.

In the foregoing the plaintiff redemption action succeeds and I make the following order: The plaintiff is directed to pay to the second defendant the amount due in full within 6 months upon which the second defendant shall effect an appropriate discharge and release the title documents to the plaintiff. The plaintiff should pay the first defendant a sum equivalent to half the value of the house upon valuation by a registered value less the amount paid to the second defendant. I also direct that if the plaintiff makes default in such payment her action is to stand dismissed with costs.

MWAKALINDILE v NBC HOLDING CORPORATION AND ANOTHER [2001]

COURT OF APPEAL OF TANZANIA AT MBEYA
RAMADHANI, LUBUVA AND LUGAKINGIRA JJA

Date of Judgment: 2 April 2001

Case Number: 59/00

SOURCED BY: LJS MWANDAMBO

CITATION: [2000] LLR 6 (CAT)

Importance

Comparative law plays an important role in any jurisdiction to inform jurists about how others have tackled similar problems that arise. This case is a recent one from Tanzania dealing with the wife's interest in matrimonial property and analysing the effect of section 59 of the Tanzania Law of Marriage Act, which grants a registrable interest to a spouse in the Matrimonial home of the couple.

[1] Land Mortgage – Matrimonial home – Registered in husband's name – Consent of spouse required to enter into mortgage – spouse had a registrable interest – No caveat in the register – Whether the lack of spouse's consent rendered the mortgage null and void – Whether mortgagee would be stopped from exercising statutory power of sale – Law of Marriage Act 1971, section 59.

[2] Family laws – Matrimonial home registered in sole name of husband – Wife has a registrable interest but she did not register a caveat – Spouse did not consent to the mortgage was null v and void – Whether statutory power of sale could be exercised.

Editor's Summary

The matrimonial home of the spouses in this case was registered in the name of the husband. He mortgaged the house to N as security for loan that he applied for, and received, without the wife's knowledge or consent. Being the matrimonial home of the spouses, the wife had an interest capable of being registered by caution of caveat under the Law of Marriage Act. She had not however registered her interest in the land register.

On discovering that the house had been put up for auction by N, the wife filed a suit against N and her husband seeking an injunction to stop the sale and a declaration that the mortgage contravened the law of the Marriage Act. The suit was dismissed and the wife appealed. She argued that, having found that the mortgaged house was a matrimonial home which had been mortgaged without her consent, the Judge erred by not declaring the mortgage null and void.

Held:

1. A matrimonial house owned by the wife or husband ought not to be alienated by way of sale, mortgage, lease or gift without the consent of the other spouse.
2. In this case, the wife's interest had not been registered and the chargee had no way of knowing that the house was a matrimonial property. The charge took place in such circumstances that the mortgaging and alienation of the house was not null and void.
3. In any case, the interests of the wife were protected by section 59(2) of the Law of Marriage Act, which permitted her to continue residing in the house until the dissolution of the marriage

Assessment

Once, again, the Court was called upon to arbitrate on competing interests between a spouse in possession of property and a chargee seeking to exercise the statutory power of sale. Unlike in Kenya where the spouse's interest would fall to be decided simply on the law of trust. In Tanzania the provision of statute had to be considered. Having stated that, the Law of Marriage Act as interpreted by this court indicates the parlous nature of possessory rights of a spouse as against the chargee's statutory power of sale. The court's interpretation in favour of the rights of the chargee could be criticised for hacking away at the protection that Parliament intended to grant to the matrimonial home of married couples from the vagaries of commercial law.

However, the Court's recognition of the possessory right of the wife notwithstanding the alienation of the suit premises is commendable for according to the intentions of the legislature. All the same, it is not clear what the legal status of the possession would be. Would the owner of the property be entitled to charge a reasonable rent or would the couple have free possession for as long as their marriage lasts? Apart from dissolution of the marriage, would there be another method of terminating the tenancy? Would such a *sui generis* tenancy be governed by any rights and remedies for both parties, and would the legal owner have the right to terminate the tenancy on account of serious breach for example deliberate waste? And what happens when the marriage prematurely comes to an end, for example by the demise of the husband; does the wife suddenly lose the right of possession, at her greatest hours of need.

Judgment

LUBUVA JA: In High Court civil case number 6 of 1997, the appellant, Iddah Mwakalindile, had filed a suit against the first respondent, NBC Holding Corporation

and the second respondent, Sam Saijen Mwakalindile, her husband. Her case was that through the media of a local Kiswahili newspaper, (*Nipashe* of 26 March 1997) she became aware that the house on plot number 22C Block 1 Usafwa Road, Mbeya, was one of the houses due for auctioning. This house belongs to her and the husband, the second respondent as their matrimonial property. The first respondent had authorised M/S Mabama Auction Mart to auction the house which had been mortgaged by the second respondent. The mortgage was in respect of a loan raised by the second respondent from the then National Bank of Commerce. Neither was she aware of the loan nor did she consent to the house being mortgaged. It was a family house in which both she and the second respondent with their family lived. Upon seeing the advertisement in the newspaper, she filed the suit seeking three orders, namely:

- (a) A declaration that the mortgage deed entered into between the first and second defendants is illegal for contravening section 59(1) of the Law of Marriage Act, 1971.
- (b) The proclamation of sale made by the first defendant through the auctioneer is illegal for contravening section 48(1)(e) of the Civil Procedure Code.
- (c) A perpetual injunction to restrain the first defendant from dealing selling or disposing off the house on plot 22C Block 1 Usafwa Road, Mbeya, without the consent of the plaintiff.

Before the commencement of the bearing of the suit, the High Court (Mwipopo J) issued an order for stay of the proclaimed sale pending the determination of the suit. At the conclusion of the trial, the Learned Judge held that the provisions of section 59(1) of the Marriage Act, 1971, did not apply. The Judge also held that the second respondent had a right to mortgage the house without the consent of the plaintiff and that the first respondent also had the right to sell the mortgaged house. Consequently, the suit was dismissed with costs against the second respondent and the plaintiff. The appellant is appealing against the decision.

Mr Mkumbe, Learned counsel for the appellant argued two grounds. First, he contended that the Learned Judge erred in law in holding that section 59(1) of the Marriage Act, 1971 did not apply. He said the Judge having held that the mortgaged house was a matrimonial home, and that the appellant, the wife of the second defendant, had not consented to the mortgage it was an error in law to hold that the mortgaging of the house was not null and void in terms of the provisions of section 59(1). Mr Mkumbe strongly maintained that the appellant, the other spouse, did not know anything about the loan and the mortgage. In that situation, he further said, she was not in a position to consent to the mortgage. So, the appellant was protected under the law, Mr Mkumbe argued.

With respect, we are not persuaded by Mr Mkumbe's submission. We have had close perusal of the provisions of section 59(1) of the Law of Marriage Act, 1971. It provides that:

- 59(1) Where any estate or interest in the matrimonial home is owned by the husband or by the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage, or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution, or otherwise under any other law for the time being in force relating to the registration of title to land or of deeds."

Under this provision, it is beyond dispute that a matrimonial house owned by the wife or husband ought not be alienated by way of sale, mortgage, lease or gift without the consent of the other spouse. In this case, as Mr Mwakilasa, Learned counsel submitted, the mortgagee, the bank was not aware that the house was a matrimonial property. It was registered in the name of the second respondent and not in the names of both the appellant and the second respondent. For that reason, the bank, the first respondent, had no reason not to believe that the house belonged to the first respondent. We agree that the appellant had a registrable interest in the house, which, as provided under this section, could be protected by a caveat. The appellant did not register a caveat with the Registrar of Titles. The caveat, would serve as a warning to the second respondent that the house was a matrimonial property. The absence of a caveat in this case also conceded by Mr Mkumbe.

In the circumstance, there being no caveat to protect the registrable interest of the appellant, there was no way in which the first respondent could know that the house was a matrimonial property. The second respondent, who was not represented, said nothing more than confirming that he did not inform the about the mortgage. He added further that he did not know that under the law, he had to involve the appellant for her consent. In obtaining the loan, the second respondent voluntarily mortgaged the house which was registered in his name. The house as mortgaged, provided the security for the repayment of the loan. Therefore, the transaction took place in such circumstances that we agree with the Learned Judge that the mortgaging and alienation of the house was not null and void in contravention of section 59(1) of the Law of the marriage Act, 1971.

However, it is to be observed that subsection (2) of section 59 of the Act, takes care of the interests of the spouse whose interests have been affected under sub-section (1). Under sub-section (2) it is provided to the effect that where an estate or interest in a matrimonial home is alienated or mortgaged contrary to sub-section (1), the estate or interest so created shall be subject to the right of the other spouse to continue to reside

in that matrimonial home until the marriage is dissolved. In the instant case, as the marriage is still subsisting, the repercussion is that the interest of the appellant is protected under this sub-section of the Act until the dissolution of the marriage. Otherwise, there is no merit in ground one of the appeal. It is dismissed.

In ground *two*, Mr Mkumbe contended that having held that the said matrimonial house is the only one used by the plaintiff for residence, the Learned Judge erred in law and fact in holding that the said residential house could in law be sold or auctioned by the first respondent, contrary to section 48(1)(e) of the Civil Procedure Code. With respect, we need not be delayed in this ground. It is devoid of any merit. The provisions of section 48(1)(e) of the Civil Procedure Code are too clear to require any further elaboration. The section applies to residential houses in regard to attachment and sale in execution of a decree. In this case, the matter does not involve the execution of a decree, it concerns a mortgage. For that reason, it is our view that section 48(1)(e) of the Civil Procedure Code is irrelevant. Mr Mwakilasa, Learned advocate for the appellant had also argued to this effect. The proclamation for sale was, we think, proper. Ground two also fails.

In the upshot, for the foregoing reasons, the appeal is dismissed with costs.

AL-AMIN V MOHAMED [1998]

HIGH COURT OF KENYA AT MOMBASA

HAYANGA J

Date of Ruling: 16 and 23 November 1998

Case Number: DC 1/95

SOURCED BY: LAWAFRICA

CITATION: [1995] LLR 4 (HCK)

Importance

This court did not even mention the Married Women's Property Act, yet the dispute between the parties involved the question of property. The case illustrates the Matrimonial cause jurisdiction of the Courts, and somehow implicitly, brings to focus the differences between this jurisdiction and the MPWA jurisdiction

[1] Family law – Property – Settlement of property – Order for maintenance – Inhabitation registered against husband's property – Husband willing to deposit money interest bearing account to provide security for maintenance – Whether court can restrict husband from dealing with his property – Section 27 Matrimonial Cause Act.

Editor's Summary

In 1997 in a divorce cause between the parties, the trial Judge made orders inhibiting dealing with the suit property until further orders. The property was owned by the husband and was neither in the possession nor reversion of the wife. The husband claimed that he was already paying maintenance for the children as ordered by the Court. The wife objected to the removal of the inhibition on the ground that it was being done for the benefit of a third party. The court was called upon to decide whether it had jurisdiction to alter the property rights of the husband.

Held:

1. The Matrimonial Causes Act can order settlement of property where the same was in the possession or reversion of the wife, or was subject to an ante or post-nuptial agreement. There would need to be an application under Rule 45 of the Matrimonial Causes Rules.
2. The property in this case did not fall under the definition above. Since the husband was willing to deposit security for maintenance of the children, the inhibition would be revoked.

Application allowed.

Assessment

The Judge did not refer to any cases, only to statute. He did not attempt any detailed elaboration of the principles of law applicable to this case. Yet one can see a deference to property law principles, a recognition that lacks jurisdiction interfere with property rights here because section 27 of the Matrimonial Causes act applies only in property which is in the possession or reversion of the spouse seeking relief.

Ruling

On 17 September 1993 I wrote a ruling in this application and so as to relate to it I shall reproduce the relevant portion:

“On 14 April 1937 Honourable Ang’awa made an order in a Divorce case granting an order of inhibition against plot number 276/SXXI/MI inhibiting registering of any dealings with that land until further orders of the Court. She gave either party at liberty to apply for carrying the Order. Now by Chamber Summons, dated 4 June 1998 the respondent/Husband applies wishing to vary the order but his prayer is couched in these terms:

“That this Honourable Court be pleased to Review the order made by Hon Justice Ang’awa on the 10 April 1957 and particularly order the removal of the inhibition order registered against plot number 276/SXXI/MI and substitute the same with an order that the applicant deposits in a fixed deposit account in the joint names of the respondent and the DR an amount of KShs 1 000 000 for the benefit of the respondent and the issues of the marriage.”

“The reasons for this prayer are among others that because of the inhibition the plot cannot be used as a collateral. That it being so tied makes the applicant not be able to develop the property particularly he wants to mortgage the same to raise monies for some investments. He is now paying monthly amount of KShs 6 000 for maintenance of the children, but the respondent has opposed this application through affidavit sworn on 11 June 1998 and filed herein on the same day. She says the loan the applicant requires is not for him but for a third party and that it is the same third party that seeks to make the deposit of KShs 1 million and that the property in question is the property encumbered in Miss Ang’awa J’s order and is matrimonial property.”

Under section 27 of Chapter 152 the Court has to order “settlement” of property where decree of divorce or judicial separation is made by reason of wife’s adultery, cruelty or desertion of wife, that the wife is entitled to any property either in, possession or reversion the Court when it thinks fit can order such settlement as it

thinks reasonable to be on the property. But there needs to be application as is stated under Rule 45 of the Matrimonial Causes Rules, besides the property in such a situation needs to be property in possession or reversion.

The Court can also make orders on property where existed ante or postnuptial settlements made on the parties. This is not so here.

This matter involves children and although the property in question belongs to the husband without any encumbrance, and as I feel the Court should not unduly interfere with its owner yet I realize that this Court has already encumbered it and for the benefit of children, I would require that the parties before me for investigations pursuant to Rule 48 of the Matrimonial Causes Rules to enable me to investigate the allegations and answers made in the application by the parties particularly the circumstances and conditions of the children.

(One week later, after the further investigation, His Lordship concluded)

I deferred the final decision here to receive further evidence to ascertain circumstances and position, of the children in compliance with this I sought and the children were shown to me and I also saw the parents. I have also read the further affidavits.

I have now considered this matter and I think this Court, cannot without proper cause block a registered owner of property from dealing with it in the way he wants for fear that in future he will be unable to pay maintenance for the children. This property is not any of such property that Court can settle under section 27 of Chapter 152 or any property on which existed ante or post nuptial settlement made on the parties.

My view is that the order of inhibition by Honourable Ang'awa J made on 14 April 1997 against plot number 27-6/SXXI/MI inhibiting registering of any dealings with the land until further orders is hereby revoked, but before any such revocation and its stead the respondent shall deposit an amount of KShs 1 200 000, in a deposit account in the joint names of both his advocate and the advocate of the petitioner forthwith. That the interest accruing from this amount deposited be drawn monthly for the maintenance of the petitioner and the children. That parties to deposit the said amount either with Barclays Bank or EA Building Society.

That any further necessary orders required for the full implementation of this order to be made in 2 weeks and that this matter will be mentioned on or about 18 November 1998 to confirm due compliance of this order and or to vary same if necessary. Each party to have liberty to apply. Cost to the petitioner.

HAMOUD v HAMOUD [2000]

HIGH COURT OF KENYA AT MOMBASA

WAKI J

Date of Ruling: 9 May 2000

Case Number: 74/99

SOURCED BY: LAWAFRICA

CITATION: [1999] LLR 100 (HCK)

Importance

The parties in this matter submitted themselves to the jurisdiction of the Kadhi's Court in their property dispute. They later entered into a consent agreement. The question that must be posed is whether the Kadhi's Court had jurisdiction to determine or even resolve a property dispute between the parties.

[1] Family law – Property – Both parties profess Islam – Matters submitted to Kadhi's Court – Subsequent consent agreement – Whether Kadhi's Court had jurisdiction – Whether subsequent application to High court res judicata.

Editor's Summary

In 1991 after a dispute between the parties, the wife file suit in a Kadhi's Court seeking, *inter alia*, a share of matrimonial property. The parties subsequently signed a consent agreement settling the case. Some years later, the wife moved to the High Court for a determination of matrimonial property.

Held: The Kadhi's Court was competent to try the issue of matrimonial property. As the matter had been settled by consent, it was *res judicata* and the wife would not be permitted to re-agitate the same issues.

Assessment

This case caught the editor's attention because of a point of law that was not really canvassed at all: Does a Kadhi's Court have jurisdiction to deal with property issues between spouses. Considering the principles enunciated in the previously handled decisions⁴⁵ of the Courts, it seems clear that they do not. Yet for Muslims, questions of division of property between spouses are dealt with as part of their personal law, as happened in this case. It seems reasonable to suggest that a court where a determination of inter-spousal property between Muslims is done would be entitled to consider how the parties organized their affairs and how they intended their property arrangements to have effect. For example, an ante-nuptial arrangement between the spouses may be evidence that may be used to impute or contest the imputation of a trust between the spouses.

⁴⁵ For example *Essa v Essa*.

Ruling

The defendant in the Originating Summons filed herein has applied to have it struck out on the ground that it is *res judicata*. That is to say in terms of section 7 of Civil Procedure Act, that:

“The matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same Title in a court competent to try such subsequent suit or the suit; in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

It is stated in the chamber summons dated 23 March 2000 and the affidavit in support thereof that the parties in this originating summons are man and wife professing the Muslim faith.

The plaintiff in the Originating Summons “Fauzia Salim Hamoud” is also known as “Fauzia Mbithi” (hereinafter wife) while the defendant “Ramadhan Salim Hamoud” is also known as “Ramadhan Salim” (hereinafter husband).

In 1991, a misunderstanding arose between the two and the wife filed suit against the husband before the Kadhi’s Court being KCC 263 of 1991. She sought maintenance for herself and the 5 children of their marriage, custody of the children, a share of real property and ice cream business. The husband filed defence denying that he was not maintaining the wife and children. He alleged it was the wife who had deserted the matrimonial home and engaged in adulterous affairs. The matter was set down for hearing on two occasions but on 20 March 1992 both parties signed and filed a consent stating that the case had been settled. The litigation was therefore terminated.

Seven years down the line, the wife now returns, this time to the High Court, and seeks orders under the Married Women Property Act 1882 for apportionment of the matrimonial property and under the Guardianship of Infants Act for the custody and maintenance of the children of the marriage.

Learned counsel for the husband Mr Taib submitted that those issues cannot now be raised as new causes of action as the matters were finally decided by a court of competent jurisdiction which the Kadhi’s Court was. There was no response from the wife or her counsel to the Application. For some unexplained reasons the wife did not give instructions thereon to her Advocates despite promises to do so. The Advocates, through present, had therefore no right of reply.

I agree with Mr Taib that matters of property, custody and maintenance of the children as at March 1992 were compromised in the suit filed before the Kadhi with the consent of both parties. That consent was not challenged subsequently on any ground that is sufficient to impeach a contract like fraud, misrepresentation or illegality. It was a formal determination of the matters submitted to court for

adjudication. The filing of fresh suits related to the self-same matters or issues by the same parties would attract the censure of section 7 Civil Procedure Act.

(The court then considered whether the issue of custody was *res judicata* and struck out all prayers save those for custody).

Editor's Note

No appeal was [referred against these orders. On 15 March 2001, this whole suit was struck out for want of prosecution.

ONEGE V ZAHLTEN [2000]

HIGH COURT OF KENYA AT MOMBASA

HAYANGA J

Date of Ruling: 22 June 2000

Case Number: 30/99

SOURCED BY: LAWAFRICA

CITATION: [1999] LLR 89 (HCK)

Importance

The decision serves once again to show the primacy placed by Kenyan courts on the fact of marriage as a pre-requisite for determining the property rights of cohabiting couples.

[1] Family law – Property – Parties were cohabiting – Question of marriage – Whether fundamental to a determination of matrimonial property.

Editor's Summary

The parties in this union were cohabiting, although the man denied the existence of any marriage. The woman sought a determination of her beneficial interests in property acquired during this union. The court considered in passing whether to grant an adjournment to allow the woman to give evidence of marriage.

Held: The woman would be given an adjournment to enable her give evidence of marriage. In this case the evidence of marriage is a crucial factor.

Assessment

This decision has little legal value, but as an illustration of the importance of the issue of marriage in a property rights determination.⁴⁶ The decision also serves to show how the *sui generis* approach of Kenyan courts to determination of property rights between spouses is not moored on any general property law principles. The stubborn insistence of the Law Lords in *Pettit* and *Gissing* that in the separate property regime the fact of marriage alone would not disrupt property rights seems to have fallen on deaf ears as far as their Kenyan counterparts are concerned. The fact of marriage⁴⁷ is only relevant if an application is brought under the MPWA, which clearly only applies to married couples. However, as stated in *Gissing* and repeated in *Kamare*, a party may obtain a suitable relief by proceeding alternatively through a declaratory suit.

46 A similar approach is adopted in *Kabui v Wairimu* to the centrality of the issue of marriage in a property rights determination.

47 By the fact of marriage is meant the question of whether, independent of any cohabitation the parties had contracted a legally valid marriage.

Hence in England, the MPWA has been held to apply to parties who have been in long cohabitation.⁴⁸ Exclusive of public policy considerations in favour of marriage and against cohabitation, it is clear that cohabiting couples would be treated as any other related or unrelated parties who have arranged their affairs closely for purposes of determining the beneficial interest each holds in jointly-acquired property.

Ruling

In this application for injunction, the applicant (wife) has argued on the presumption that there was a marriage between her and the husband (defendant) over matrimonial union existing between the parties. The claim is for distribution of property acquired during the state of cohabitation between the two. The main issue therefore hinges on that relationship and the existence of marriage is the crucial factor. It is the Court's duty to adjudicate issues between parties that conclude the differences between them. It is the legal duty of the Courts to channel and synthesize those issues so that conclusive adjudication upon them settles those disputes in law.

(... The court then considered whether to allow an amendment of the pleadings to reflect the marital status of the parties)

Therefore so as to allow Mrs Nandwa to effect an amendment which amendment, in my view has a direct scope of bringing before this court the very issue which relates to this matter. I think the Court is bound as a matter of justice to allow this.

(... application for adjournment allowed).

⁴⁸ See for example *Hammond v Mitchell* (*supra*) note 40.

RE KAARA'S ESTATE [2000]

HIGH COURT OF KENYA AT NAIROBI

MULWA J

Date of Judgment: 14 July 2000

Case Number: 1934/95

SOURCED BY: LAWAFRICA

CITATION: [1995] LLR 1115 (HCK)

Importance

This case is a useful illustration of how a family law question as to property between spouses can arise in a succession matter. Generally, the law of succession would make provision for the dependants of a deceased even where the deceased expressly excludes them. For a surviving spouse, her interest in the deceased's property would generally be assured. Yet, is there a reason why the right of the spouses to a beneficial interest in property should cease on death? It is foreseen that a spouse whose legacy is prejudiced by the application of testamentary provisions could apply for a determination of her rights to property; another reason why the Courts must be careful about the principles they develop for distributing (if the term was permitted) inter-spousal property.

[1] Succession – Distribution of property – Two wives of deceased – Petitioner had lived with deceased and helped in acquisition of two properties – She sought order of her entitlement to one property and her right of occupation therein.

[2] Family law – Property – Succession matter – Whether court would consider contribution of petitioner to acquisition of property by deceased husband – Whether widow entitled to the property.

Editor's Summary

The petitioner married the deceased in 1972 after he had separated from his former wife. During the course of their marriage and from the joint contributions of the spouses, the deceased acquired a Mwea and a Karen property, the latter being the matrimonial home. When the deceased started ailing, he brought back his first wife and allowed her to reside in the Mwea property. On the husband's demise and within the succession cause, the petitioner applied to be allowed to keep the Karen property on the grounds that she had contributed to its acquisition and that it was her matrimonial home. The first wife objected, stating that the property should be divided among the beneficiaries like the other properties of the deceased.

Held: The petitioner was entitled as of right to a half share in the Karen property. As the deceased had left a will giving the Karen property to the petitioner and the Mwea property to the objector, the Court shall enforce the wishes of the deceased and declare that the petitioner held the Karen property in trust for her children.

Assessment

The actual ratio and decision of this case is not commendable due to the general confusion between property and succession principles. The Judge seems to jump to his conclusion without having adequately prepared the landing gear of legal principles. Having found that the applicant had a beneficial interest in half share of the Karen property, why should he find a trust for the whole property in favour of the children of the marriage? If the Judge was making a decision based on succession, then the finding that contribution entitles her to half share in the property is left hanging in mid-air. One would also query how under succession principles the Objector herein received the whole Mwea property in trust for her children. This decision highlights the perils faced in any adjudication when the Court jumps towards the conclusion it perceives to be most fair without first studying the legal principles to be applied on its way there.

The facts of the case however are potent illustration of the capacity of principles enunciated in family law of property to spread their wings and extend throughout the legal landscape, covering vast areas of jurisprudence with their shadow. It is our contention that the shadow so formed has the potential to turn property jurisprudence topsy-turvy and disrupt the seamless integration of property and person law that is a necessary feature of any legal system

Judgment

MULWA J: The background to this petition is that both the Petitioner and the Objector were wives of the deceased, Julius Munyi Mara who when he died left a number of properties including the Land Reference number 150065/4. The Petitioner claims that this particular property formed her matrimonial home and she had contributed towards its building and therefore in distributing the estate, she should be allowed to keep the house. To support her claim, the Petitioner gave evidence that:

1. The Objector who was married to the deceased had separated with the deceased since 1980 and during the period she was away, she did not participate in any activity the deceased was undertaking at home or in Nairobi.
2. The Objector when she got married to the deceased, she was living in a mud grass thatched house.
3. The Petitioner married the deceased in 1981 and she was working in Nairobi at Sauti Sacco. She did not find the Objector in the family as they had separated. They lived in Ngara Estate and later moved to Kileleshwa government house until 1993. They then constructed a permanent house at Mwea as there were only two mud grass thatched houses, one for the mother-in-law and the other one was presumably for her husband. She produced some photographs of the two houses. They started an horticultural venture and she was doing all the marketing and

produced some bank statements and invoices. They used this money which she used to put in the account to put up the Karen house as well.

4. When the husband became sick he decided to bring the Objector back. He consulted the petitioner and the mother, all who agreed to the proposal that the Objector be given the new Mwea house and all the farming implements. The petitioner only took away her furniture. It was further agreed that the petitioner retains the Nairobi house.
5. She was the one who supervised the building of the Nairobi house and she produced the Agreements, the workers used to sign.
6. She has young children aged 12, 15 and 16 years while the children of the Objector are all weaned. She pays well over KShs 100 000 for school fees.
7. The meeting of elders also agreed that she retains the Karen House as there is no money to build her another house.

In her evidence the Objector said that she married the deceased in 1972. She said that they were separated with her husband but not divorced. She did not know when the deceased married the Petitioner. She would like to have the properties including the Nairobi property shared equally among the beneficiaries as it belonged to her late husband.

(His Lordship then considered the evidence)

I have accepted (the petitioner's) evidence on the issue of her contribution and I hold that she is entitled to half of the property in Karen. What could be discussed, as forming part of the estate would be the other half of that property which belonged to the deceased. In her evidence the Petitioner gave evidence that there was a Will of the deceased which had given her the home at Karen. This Will was not the subject of litigation and was not produced in court. The Objector was given the Mwea house for which she contributed nothing. The petitioner has young children in school while those of the Objector are either working or married. The husband must have taken these matters into consideration when he directed that the Karen house goes to the petitioner. He obviously must have meant that his half interest in the house goes to the petitioner, as she already would be entitled to one half by virtue of her contribution towards the construction of the house. When one takes into account these factors, it stands to reason that it is only fair that the Karen house goes to the petitioner. The petitioner shall hold the Karen property in trust for her children while the Objector shall hold the Mwea property in trust for her children. There will be no order as to costs.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The States parties to the present Convention.

Noting that the Charter of the United Nations reaffirms faith in fundamental human right, in the dignity and worth of the human person and in the equal rights of man and women.

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and right and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.

Noting that the States Parties to the International Conventions on Human Rights have the obligations to ensure that equal right of men and women to enjoy all economic, social cultural, civil and political rights.

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women.

Concerned, however, that despite these various instruments extensively discrimination against women continue to exist.

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, it is an obstacle to the participation of women, on equal terms with men, in the political, social economic and cultural life of their countries hampers the growth of the prosperity of the society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs.

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly toward the promotion of equality between men and women.

Emphasizing that the eradication of apartheid, of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights and men and women.

Affirming that the strengthening international peace and security, relation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, and in particular

nuclear disarmament under strict and effect international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women.

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.

Beating in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1: For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2: States Parties condemn “discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to

ensure. Through law and other appropriate means, the practical realization of this principle:

- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate. Prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women,

Article 3: States Parties shall take in all fields, in particular in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4:

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5: States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6: States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7: States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non governmental organizations and associations concerned with the public and political life of the country.

PART III

Article 10: State Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions or career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories rural as well as in urban areas; this equality shall be ensured in preschool, general technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality.
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

- (d) The same opportunities to benefit from scholarships and other study grant;
- (e) The same opportunities for access to programmes of continuing education including adult and functional illiteracy programmes particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11: States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the equality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the ground of pregnancy or maternity leave and discrimination in dismissal on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12:

1. States parties shall take all appropriate measure to eliminate discrimination against women in the filed care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this article, States parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13: States parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life tin order to ensure, on a basis of equality of men and women =, the same rights in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspect of cultural life.

Article 14:

1. States Parties shall take into account the particular problems faced by rural women and significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, shall take all appropriate measures to ensure the application of provision of this Convention to women in rural areas.

2. States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women that they participate in and benefit from rural development and, in particular, shall ensure to such women right:

- (a) To participate in the elaboration and implementation of development planning at all levels;

- (b) To have access to adequate health care facilities, including information, counseling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operative in order to obtain equal access to the economic opportunities through employment or self employment.
- (f) To participate in all community activities
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes.
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15:

1. State parties shall accord to women equality with men before the laws
2. States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, the shall give women equally rights to conclude contracts and to administer property and shall treat them in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all others private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same right with regard to the law relating to the movements of person and the freedom to choose their residence and domicile

Article 16:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (a) the same right to enter into marriage;

- (b) The same right free to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same right and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interest of the children shall be paramount;
- (g) The same person rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriage in an official registry compulsory.

PART V

Article 17:

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of person nominated by States parties. Each party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary - General of the United Nations shall address a letter to the States parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all person thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Election of the members of the Committee shall be held at a meeting of State Parties convened by the Secretary-General at United Nations Headquarters. At that meeting for which two thirds of the States Parties shall constitute a quorum, the persons elected to the committee shall be those nominees who obtain the largest number of the votes of the representatives of States parties present and voting.

5. The members of the committees shall be elected or a term of four years. However, the term of nine of the members elected at the first election shall expire at the end of two year; immediately after the first election the names of these nine members shall be chosen by lot by Chairman of the Committee.

6. The election of the five additional members of the Committees shall be held in accordance with the provisions of paragraph 2, 3 and 4 of this articles, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the committee.

7. For the filing of the casual vacancies, the States party whose expert has ceased to function as a member of the Committee shall be appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the committee under r the present Convention.

Article 18:

1. State parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative judicial, administrative or other measure which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned, and

- (b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 20.

1. the committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the Present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Articles 21:

1. the committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the committee together with comments, if any, from States parties.

2. The Secretary-General shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22: The Specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present convention as fall within the scope of their activities. The Committees may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23: Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State party; or
- (b) In any other international convention, treaty or agreement in force for that State.

Article 24: States parties undertakes to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present convention.

Article 25:

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instrument of ratification shall be effected by the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26:

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27:

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28:

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by states at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall be permitted.
3. Reservation may be withdrawn at any time by notification to this effect addressed to the Secretary –General of the United Nations, who shall then inform all States thereof. Such notification shall be take effect on the date on which it is received.

Article 29: Any dispute between two or more States Parties concerning the interpretation or application of though present Convention which is not settled by the negotiation shall, at the request of one of them, be submitted to arbitration. If within six month from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer

the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other State parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

Any State party which has made a reservation in accordance with paragraphs 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30: The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

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